

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-6119

To be argued by:
MURRAY A. GORDON, ESQ.

United States Court of Appeals
For the Second Circuit

Docket No. 77-6119

BERALDINE L. ACHA and ARLENE M. EGAN, each
individually and on behalf of all others similarly situated,
Plaintiffs-Appellants.
against

ABRAHAM D. BEAME, individually and in his capacity as Mayor
of the City of New York, MICHAEL J. CODD, individually and
in his capacity as Police Commissioner of the New York City
Police Department, and THE CITY OF NEW YORK, as a public
employer,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFFS-APPELLANTS

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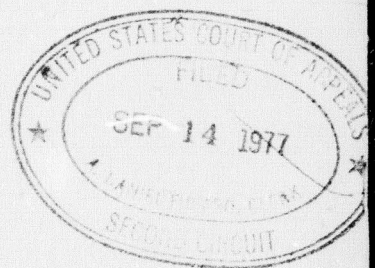


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Statement of Issues Presented for Review

1. May a final judgment be vacated on the grounds that it was legally incorrect in the light of later Supreme Court decisions where an appeal from the judgment has been dismissed by this Court and the time to appeal has expired?

2. Are former New York City Policewomen laid-off as a result of the City's fiscal crisis, who have demonstrated to the satisfaction of the court below that but for their sex they would have been hired early enough to have withstood such lay-off, entitled to Title VII relief in the form of rightful seniority dates where the required agency complaint and litigation by the discriminatees was timely so far as the lay-offs are concerned but the rightful seniority dates of those discriminatees precede the effective date of Title VII and were, in some cases, more than 300 days earlier than the date complaints of discrimination were filed?

3. Are the aforesaid former Policewomen entitled to 42 U.S.C. § 1983 relief, likewise in the form of rightful seniority dates, where those dates are more than three years before the institution of this action?

4. Are the aforesaid lay-offs violative of Title VII and/or 42 U.S.C. § 1983 where the lay-off roster chosen by defendants to implement a state statutory seniority system, caused as the defendants could have anticipated, the lay-off of approximately 60% of the Policewomen and approximately 20% of the Patrolmen in the New York City Police Department, although the defendants could by law have chosen a lay-off roster which would have resulted in

the furloughing of an equal percentage of Policewomen and Patrolmen, and no compelling necessity or justification exists for the lay-off roster chosen by defendants?

Applicable Constitutional and Statutory Provisions

1. Fourteenth Amendment to the United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. 42 U.S.C.A. §1983; 17 Stat. 13; R.S. §1979:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3. 42 U.S.C. §2000e(b); Pub. L. 88-352, Title VII, §701, July 2, 1964; 78 Stat. 253; Pub. L. 89-554, §8(a), Sept. 6, 1966; 80 Stat. 662; Pub. L. 92-261, §2, Mar. 24, 1972; 86 Stat. 103:

"For the purposes of this subchapter--

(b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organ-

ization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents), shall not be considered employers."

4.

42 U.S.C. §2000e - 2(a)(1), (h), (j),; Pub. L. 88-352, Title VII, §703, July 2, 1964; 78 Stat. 255; Pub. L. 92-261, §8(a), (b), Mar. 24, 1972; 86 Stat. 109.

"(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

"(h) Notwithstanding any other provisions of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin."

"(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section or other area."

5. 42 U.S.C. §2000e-5(e), (g); Pub. L. 88-352, Title VII, §706, July 2, 1964, 78 Stat. 259; Pub. L. 92-261, §4, Mar. 24, 1972, 86 Stat. 104.

"(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency."

"(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title."

6. Rule 54(b), FRCP; as amended Dec. 27, 1946, eff. Mar. 19, 1948; Apr. 17, 1961, eff. July 19, 1961.

"(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

7. Rule 60(b), FRCP; as amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not effect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order

or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

8. New York Civil Service Law, §50(7); L.1958, C.790, §1; amended L.1964, C.645, §3; L.1966, C.870, §1.

"7. Limitation of eligibility to one sex. The state civil service department or the municipal commission having jurisdiction may limit eligibility for examination to one sex when the duties of the position involved relate to the institutional or other custody or care of persons of the same sex, or visitation, inspection or work of any kind the nature of which requires sex selection."

9. New York Civil Service Law, §80(1); L.1958, C.790, §1; L.1972, C.283, §§2-6.

"1. Suspension or demotion. Where, because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, positions in the competitive class are abolished or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions shall be made in the inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of position occurs, subject to the provisions of subdivision seven of section eighty-five of this chapter; provided, however, that the date of original appointment of any such incumbent who was transferred to such governmental jurisdiction from another governmental jurisdiction upon the transfer of functions shall be the date of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction from which such transfer was made. Notwithstanding the provisions of this subdivision, however, upon the abolition or reduction of positions in the competitive class, incumbents holding the same or similar positions who have not completed their probationary service shall be suspended or demoted, as the case may be before any permanent incumbents, and among such probationary employees the order of suspension or demotion shall be determined as if such employees

were permanent incumbents."

10. New York Civil Service Law, §85(7); L.1958, C.790, §1; amended L.1961, C.532, §1; L.1966, C.908, §1; L.1967, C.806, §1; L.1968, C.316, §1; L.1969, C.31, §1; L.1970, C.80, §1; L.1971, C.15, §1; L.1971, C.438, §1; L.1972, C.283, §9; L.1972, C.417, §1.

"7. Preference in retention upon the abolition of position. In the event of the abolition or elimination of any position in the civil service for which eligible lists are established or any position the incumbent of which is encompassed by section eighty-a of this chapter, any suspension, demotion or displacement shall be made in the inverse order of the date of original appointment in the service subject to the following conditions: (1) blind employees shall be granted absolute preference in retention; (2) the date of such original appointment for disabled veterans shall be deemed to be sixty months earlier than the actual date, determined in accordance with section thirty of the general construction law; and (3) the date of such original appointment for non-disabled veterans shall be deemed to be thirty months earlier than the actual date, determined in accordance with section thirty of the general construction law."

11. New York City Administrative Code, §434a-1.0.

"Composition of force.--Until otherwise provided by the mayor, upon the recommendation of the commissioner, the police force in the police department, shall consist of the following members, to wit: (Opening par. amended by L.1963, ch.100, §385.)

1. Captains of police, not exceeding in number one to each fifty of the total number of patrolmen, in addition to the number detailed to act as inspectors;

2. Lieutenants of police, not exceeding four in number to each fifty of the total number of patrolmen;

3. Sergeants not exceeding six in number to each fifty patrolmen;

4. Surgeons of police, not exceeding forty in number, one of whom shall be chief surgeon;

5. A veterinarian.

6. A superintendent of telegraph and an assistant superintendent of telegraph;

7. Patrolmen to the number of seven thousand eight hundred thirty-nine (As amended by L.L.1946, No. 18, September 21; as amended by L.L. 1953, No. 38, March 4.)

12. New York City Administrative Code, §434a-2.0.

"Policewomen.--a. The commissioner is hereby authorized to appoint and, within the amounts appropriated therefor to provide for the compensation of women police officers, for the increased moral protection of women and minors, for the prevention of delinquency among such women and minors, and for the performance of such other duties as he may assign to them (Subd. a as amended by L.L.1942, No. 50; L.1963, ch.100, §386.)

b. So far as the same are applicable the provisions of the charter governing the police department, and the provisions of such charter relating to salaries, pensions, appointments and removals of members of the force shall apply to policewomen appointed in like manner and extent as to policemen.

c. A woman, to be eligible for appointment as policewoman shall not have passed her twenty-ninth birthday on date of filing her application for civil service examination. (Subd. c amended by L.L. 1947, No.59, August 1.)

d. There shall hereafter be but one rank and grade of women police officers in the uniformed force of the department and they shall be known as policewomen."

Preliminary Statement

This is a class action by plaintiffs-appellants, former New York City Policewomen, based on the Fourteenth Amendment, 42 U.S.C. 2000e et. seq. ("Title VII"), and 42 U.S.C. 1983 ("§1983"), alleging sex discrimination in the June 30, 1975 lay-offs of those Policewomen by the New York City Police Department ("PD"). The matter was before this Court previously. Acha v. Beame, 531 F.2d 628 (1976) ("Acha"). This appeal is from an order of United States District Court Judge Kevin T. Duffy, Southern District of New York, dated July 28, 1977, vacating prior judgments providing for permanent injunctive relief and denying preliminary injunctive relief for specific class members who had established, pursuant to standards set by this Court in Acha, that their lay-offs were the product of sex discrimination against such individual class members.

The Facts

This class action was commenced on June 26, 1975 by plaintiffs Beraldine L. Acha and Arlene M. Egan, individually and on behalf of all others similarly situated, to enjoin the disproportionate lay-off of women from the PD. Plaintiffs and the class they represent are former Policewomen ("FPW") whose employment with the PD was terminated on or after June 30, 1975, solely for budgetary reasons, allegedly pursuant to §80 of the New York Civil Service Law which essentially provides for a "last-hired first-hired" seniority system in the event of lay-offs. Each of the named plaintiffs filed charges of sex discrimination with the New York City Commission on Human Rights and with Equal Employment Oppor-

tunity Commission ("EEOC") on June 25, 1975.^{1/} A. 30-45.^{2/} The defendants-appellees are the Mayor and Police Commissioner of the City of New York ("the City"), individually and in their official capacities, and the City.

Until December 1973, separate examinations were given for the positions of Patrolman and Policewomen. A. 523-25. Women were not eligible for the former title. Nor were women eligible for the title of Police Trainee, which was open only to men under the age of 21. Men appointed to the position of Trainee were appointed to the position of Patrolman upon reaching their twenty-first birthday. The date of appointment as a Trainee is used by defendants to determine the effective date of appointment for lay-off purposes. AD. 18.

Prior to 1973 there was a quota of less than 2% set by the PD for the number of women who could be appointed to the PD. A. 270. That quota was implemented by a schedule of separate examinations given for the separate Patrolman, Patrolman/Trainee and Policewomen positions. Three examinations for the position of Policewomen were given between 1959 and 1969. AD. 19. During the same period at least 43 examinations were open for the positions of Patrolman or Patrolman/Trainee. AD. 19-20.

On October 25, 1969 two separate examinations, No. 9080 ("Exam 9080") and No. 9081 ("Exam 9081"), were given for Patrolman/Trainee and Policewoman, respectively. Although these examinations were announced and administered separately, the questions were the

2.

^{1/} The charge filed by a third class member, Alice McCain, in 1973, is discussed infra at 13n. 13.

^{2/} The Appendix is hereinafter referenced as "A.", and the Addendum submitted herewith as "AD."

same and the examinations were graded in the same manner; separate eligible lists, however, for the Patrolman/Trainee and Policewomen titles, respectively, were established as a result of these two examinations. Exam 9080 was open only to men who were not less than 16 years of age on the date of the written examination and 17 years of age on the date of appointments. Exam 9081 was open only to women not less than 19 years of age on the date of the written examination. Men passing Exam 9080 were eligible for the position of Patrolman/Trainee, a position which, as indicated, entitled them to become Patrolmen upon their 21st birthday. A. 28-29; AD 20-21. There was no comparable Trainee position available for women. A. 525.

From approximately February 1970 to January 29, 1973, as a result of a freeze on hiring by the PD, no appointments were made directly to the positions of Patrolman or Policewoman. A. 16; AD. 21. However, approximately 125 men scoring 84% or more on Exam 908 were appointed to the position of Patrolman/Trainee on May 8, 1970. AD. 21. A minimum of 130 Trainees some of whom were originally appointed as Trainees prior to May 8, 1970, were appointed as Patrolmen, during the period from May 1970 to January 29, 1973, upon reaching their 21st birthday. A. 526-28.

At least forty-nine women who took and passed Exam 9081 (the questions on which were the same as those on Exam 9080), likewise achieved scores of 84% or better, and were less than 21 years of age on May 8, 1970. A. 194-98; AD. 21. These women were not appointed on the aforesaid date solely on the grounds that the position of Patrolman/Trainee was open only to men. A. 195-97; AD. 21.

The June 30, 1975 lay-offs used an April 1, 1971 seniority

cut-off date. A. 476. Those men who were appointed to the position of Patrolman/Trainee on May 8, 1970 thus accrued sufficient seniority to withstand the lay-offs. AD. 21. The women who took Exam 9081 were appointed on January 29, 1973 or later, and were therefore laid off on June 30, 1975 in view of the April 1, 1971 cut-off date.

When the freeze was lifted on January 29, 1973, men and women were appointed to the PD from separate lists for Patrolman and Policewomen. AD. 21. During 1973, men were appointed from at least 7 different Patrolman and Patrolman/Trainee lists. A. 574-76. Women were appointed only from one Policewomen list,--that resulting from Exam 9081. A. 575. Between the end of the freeze, on January 29, 1973, and the June 30, 1975 lay-offs, 4,236 males and 513 females were appointed to the PD. A. 576; AD. 21-22. Thus, less than 11% of all persons appointed to the PD after the freeze were female (A. 576), although approximately one-quarter of all persons taking tests in October 1969 and December 1973, open to women, were female (A. 68, 272, 576).

The June 30, 1975 lay-offs, allegedly pursuant to a last-hired first-fired method of lay-off,^{3/} reflected the described past hiring policies by the PD. Approximately 400 or 60% of all Policewomen (as compared with less than 20% of all Patrolmen) were terminated. AD. 22. Prior to 1973 women comprised approximately 1.34% of the PD. Ibid. Just prior to the lay-offs women constituted approximately 2.62% of the PD. Ibid. As of July 10, 1975 approximately 1.34% of all PD police officers were women. Ibid.

4.

3/ Civil Service Law §80(1) provides for lay-offs among incumbents of "the same or similar positions...in the inverse order of original appointment..."

The June 30, 1975 lay-offs were based upon a single list comprised of men and women in the PD. The use of the merged lay-off list meant that the cut-off seniority date for lay-off purposes was April 1, 1971. A. 476. No direct appointments actually occurred that date. See AD. 59. But Civil Service Law §85 provided veterans with a minimum of 30 months constructive PD seniority. The draft, which prior to 1973 had been in effect for males only (A. 17), caused males appointed to the PD on or prior to October 1, 1973 with veterans status, to be retained and not laid-off.^{4/} 379 Policewomen were hired on or after January 23, 1973 (AD. 91-92); they were all laid-off on June 30, 1975.

Virtually each woman on the merged lay-off list had been appointed to the separate title of Policewoman, after a separate Policewoman test and from a separate Policewoman list, and virtually all the men had been appointed to the separate title of Patrolman from a separate Patrolman test and list. In April 1973 the Patrolman and Policewomen titles had been consolidated by the PD for some internal purposes. A. 84. But as of June 30, 1975, the titles of Policewoman and Patrolman were separate and not merged for budgetary purposes according to defendants at the June 30, 1975 hearing before District Judge Duffy^{5/} (A. 84) and the computer print-out prepared by the Comptroller of the City of New York dated June 30, 1975

5.

^{4/} The June 27, 1975 affidavit of PD Chief of Personnel Behan in-
correctly represented that an injunction against the lay-off of
Policewomen would cause the lay-off of men with six years experience.
A. 67-68. Defendant Codd referred to those men as having 3 to 6
years experience. A. 272. In fact, the retained Patrolmen included
men appointed as late as October 1, 1973. A. 286.

^{5/} Defendants later contended that the titles were merged in 1973
for budgetary purposes. A. 486, 542; AD. 58.

(AD. 22, 37-39). The positions of Patrolman and Policewoman are established as separate titles with separate duties by §§434a-1.0, 2.0 of the Administrative Code of the City of New York. The issue whether to establish a single, merged lay-off list of Policewomen and Patrolmen was not considered by defendants until the end of 1974. A. 486.

Prior Proceedings

Prior to the June 30, 1975 lay-offs, plaintiffs brought the instant action in the United States District Court for the Southern District of New York for a declaratory judgment declaring the proposed disproportionate lay-offs pending hearing and determination of the action; and a permanent injunction enjoining the lay-offs and the continuation of the discriminatory conduct of defendants.

A hearing was held on plaintiffs' motion for a preliminary injunction on June 30, 1975 before District Judge Duffy. A. 73ff. In an opinion and order dated July 1, 1975, Judge Duffy denied the motion for a preliminary injunction and dismissed the action. A. 102-05, reported at 401 F. Supp. 816. Plaintiffs appealed from the order and judgment of the District Court which was entered on September 2, 1975. A. 106,119.

In an opinion dated February 19, 1976, this Court reversed the order and judgment of Judge Duffy and remanded the action to the District Court for further proceedings. A. 120-43, reported at 531 F.2d 648. This Court, in remanding this case, held that:

"If a female police officer can show that, except for her sex, she would have been hired early enough to accumulate sufficient seniority to withstand the current layoffs, then her layoff violates

section 703(a)(1) of Title VII, 42 U.S.C. §2000e-2(a)(1), since it is based on sexual discrimination." (Id. at 654.)

This Court further directed that the District Court determine expeditiously, either by stipulation or after a hearing, which class members would have been hired early enough to withstand the current lay-offs had defendants not discriminated on the basis of sex in their prior hiring practices. Id. at 656. The Court declined to deal with plaintiffs' claims under §1983 and the Fourteenth Amendment. Id. at 656 n.15.

Defendants then petitioned this Court for rehearing or rehearing en banc on the grounds that Title VII did not apply to New York City prior to 1972, arguing that the prior hiring practices of defendants were not in violation of Title VII at the time they occurred. AD. 1-14, 24. In an order dated May 10, 1976, this Court denied the defendants' petitions. AD. 15.

On or about April 1, 1976, approximately 205 PD police officers were rehired, including approximately 204 Patrolmen. These rehiringings were pursuant to a federal grant. As the proceedings contemplated by this Court were not yet initiated, the parties stipulated that these rehiringings were subject to the seniority rights of such class members as might be subsequently determined in this action. A. 260.

On May 27, 1976 plaintiffs moved, inter alia, for class certification and for summary judgment for 54 class members, including 49 FPW who, but for their sex, would have been appointed as Trainees on May 8, 1970, and thereby withstood the layoffs. A. 188-91. As noted before (p. 3 supra), approximately 125 males who passed Exam 9080 with scores of 84% or higher and who were under

21 years of age on May 8, 1970, were appointed as Trainees on that date. 49 of the FPW seeking summary judgment scored 84% or more on Exam 9081 (given the same date and having the same questions as Exam 9080).^{6/} A. 194-98. Summary judgment was also sought on behalf of six class members who presented uncontradicted documentary proof of entitlement, under the standards of proof established by this Court in Acha, to sufficient seniority to withstand the lay-offs.^{7/} A. 198-200, 202-57.

Defendants cross-moved for summary judgment, arguing, inter alia, that the action was barred by the applicable statute of limitations and by laches, and that plaintiffs failed to state a cause of action as the only discriminatory practices occurred before March 24, 1972, when Title VII of the Civil Rights Act of 1964 first became applicable to municipalities. A. 265-67.

On July 7, 1976 defendants notified counsel and the District Court that they planned to rehire 60 PD police officers pursuant to another federal grant on July 19, 1976. These rehiring were scheduled to include 59 males and 1 female. AD. 26.

In an opinion and order dated July 16, 1976, Judge Duffy certified the class herein as consisting of all FPW whose employment with the PD was terminated on or after June 30, 1975, solely

8.

^{6/} This group inadvertently included one class member who was over 21 on May 8, 1970. A. 196.

^{7/} Judge Duffy denied summary judgment as to these six (A. 309), notwithstanding their documentary proof (A. 202-57) and this Court's urging in Acha of expedition (531 F.2d at 656). The Special Master sustained their claims after hearings (A. 376), and Judge Duffy confirmed her finding (A. 383-91, 395-97).

for budgetary reasons. The court below also denied defendants' cross-motion for summary judgment, and granted partial summary judgment on behalf of 38 of the 49 FPW who had alleged that they would have been hired as Trainees on May 8, 1970 but for their sex. Each of these 38 class members scored 87% or higher on Exam 9081. A. 288-89. Judge Duffy held that if 125 vacancies had been available on a non-discriminatory basis on May 8, 1970 to both males and females, only candidates scoring 87% or higher would have been appointed.^{8/} The defendants were enjoined from rehiring from a seniority roster which did not reflect the proper seniority dates (May 8, 1970) of these 38 women. A. 304-11, reported at 13 FEP Cases 16.

In the July 16, 1976 order and opinion, the partial summary judgment on behalf of 38 class members was certified as a final judgment by Judge Duffy pursuant to Rule 54(b), Fed.R.Civ.P. A. 310. On August 4, 1976, an order and partial summary judgment was entered consistent with the aforesaid opinion. A. 312-18. The seniority dates of the 38 FPW were revised to a date no later than May 8, 1970 for purposes of future rehiring and for salary, promotional, demotion, lay-off, and working condition purposes (A. 317-18); questions of bumping, back-pay, and pension contributions were reserved for later decision (*ibid*). Judge Duffy also appointed a Special Master, Renee Roberts, to hear and report on the remaining claims of class members. A. 317. On August 13, 1976, approximately 32 of the 38 class members granted revised seniority dates of May 8, 1970 were reinstated to the PD pursuant to a federal grant. AD. 27.

9.

^{8/} Relief was thus denied to 11 FPW who scored the same 84-86% as men appointed May 8, 1970.

On August 30, 1976, defendants appealed "from so much of the order and partial summary judgment entered...on August 4, 1976 as directs defendants to fix seniority dates for 38 plaintiffs at a date no later than May 8, 1970." A. 319. On September 16, 1976, defendants filed a preargument statement in connection with their appeal, setting forth the issues they proposed to raise on appeal: "laches, statute of limitations, and subject-matter jurisdiction." AD. 40. In an order dated October 7, 1976, this Court dismissed the appeal by defendants for failure to docket their appeal. A.322.

On September 30, 1976, extensive hearings commenced before the Special Master to determine which class members would have been hired early enough to withstand the lay-offs but for the discriminatory practices of defendants. AD. 27-28. To date, approximately 150 class members have presented their claims for retroactive seniority and/or back pay before the Special Master, encompassing almost 9,000 pages of transcripts. AD. 28. Findings concerning entitlement to retroactive seniority dates have been rendered by the Special Master in 77 cases in five Interim Reports. A. 323.77, 488-521, 553-68. In 45 cases, the Special Master found that, but for the prior discriminatory practices of defendants, class members could and would have become PD police officers earlier than they actually were appointed. AD. 28. In each such case the Special Master fixed a revised seniority date based upon the median appointment date from the eligibles list which was the result of a Patrolman or Patrolman/Trainee test that the class member demonstrated she could and would have taken but for her sex.^{9/} A. 325.

10.

^{9/} The use of such a median date was pursuant to stipulation (A. 325) and was based upon the procedure approved by this Court in Chance v. Board of Examiners, 534 F.2d 993,999,1007 (2d Cir.1976), cert. den. 45 U.S.L.W. 3806 (1977) ("Chance IV").

The claims of 27 class members for revised seniority were denied by the Special Master. AD. 28. In five cases, the Special Master has stated that further findings are necessary. Ibid.

On March 25, 1977 an order and judgment was entered (A. 465-77), in anticipation of rehiring for permanent positions in the PD on March 31, 1977, and temporary federally funded positions on April 1, 1977. AD. 33. In this order and judgment, Judge Duffy approved the Special Master's finding of discrimination and revised the seniority status of 34 class members.^{10/} 26 of those were granted revised seniority dates by Judge Duffy of February 8, 1970 or earlier, which seniority dates were early enough to have withstood the lay-offs. A. 471-73. The other 8 were granted revised seniority dates by Judge Duffy which, in several cases, significantly affected their position on the preferred list for rehiring.^{11/} Ibid. The March 25, 1977 order and judgment enjoined the defendants from any

11.

^{10/} As of March 25, 1977, only the first two Interim Reports of the Special Master had been filed covering 34 of the 45 cases in which she found class members to be the victims of sex discrimination. The eleven additional class members (hereinafter "the 11 class members") were found entitled to revised seniority dates in the last three Interim Reports, and were not reached in the March 25, 1977 order. AD. 28.

^{11/} In the case of these 8 class members Judge Duffy did not adopt the revised seniority dates found by the Special Master. A. 397-98. The 8 did not have a driver's license and/or a high school degree or equivalency at the dates fixed by the Special Master. This Court had specified in Acha that qualification for appointment was not in issue (531 F.2d at 656), as did Judge Duffy at an earlier point (A. 308). The Special Master had found that since each woman obtained the prerequisite qualification in time for appointment, the earlier lack thereof was not significant. A. 325-26. The requirement of licensure and degree was for appointment, not eligibility to take the test, and there was proof the overwhelming majority of PD candidates without licensure and/or degree at the time of a test procured the qualification in time for appointment. See Gordon aff. March 10, 1977 at ¶13.

rehiring which did not reflect the proper seniority status of these 34 class members, and otherwise duplicated the injunctive relief of the earlier judgment of August, 1976. A. 473-75.

On March 31, 1977, 25 class members, who were granted seniority dates early enough to have enabled them to have withstood the layoffs, were rehired to permanent positions in the PD. Four of the other 8 class members granted revised seniority dates were rehired to federally funded positions on April 1, 1977 pursuant to order and judgment of Judge Duffy. AD. 30.

As of April 1, 1977, therefore, 72 class members had proved, to the satisfaction of the Special Master and Judge Duffy, that they had been victims of sex discrimination in PD hiring ("the 72 class members"). 61 of the 72 class members had been rehired to the PD with revised seniority dates obtained herein: approximately 32 (of the 38 granted partial summary judgment) pursuant to a one-year federal grant on August 13, 1976;^{12/} 25 to permanent positions on March 31, 1977; and 4 to special federally funded positions on April 1, 1977. AD. 30. As a result of the cooperation of counsel for both sides and expeditious determinations by the Special Master and by Judge Duffy, all the described rehiring of FPW pursuant to this litigation has been accomplished without "bumping" a single incumbent from the PD either from a permanent or from a temporary position. A. 587; AD. 36.

On June 15, 1977, defendants moved pursuant to Rules 56 and 60 Fed.R.Civ.P. to renew their cross-motion for summary judgment, 12.

^{12/} These class members received permanent appointments on August 13, 1977. AD. 30.

previously denied by Judge Duffy, and from all subsequent orders and/or judgments entered, on the alleged grounds that "intervening decisions of the United States Supreme Court are controlling on the issues presented in this case and in defendants' prior cross-motion for summary judgment and require that judgment be granted in favor of defendants." A. 478. The cases relied upon by defendants were International Brotherhood of Teamsters v. United States, 45 U.S.L.W. 4506 (May 31, 1977) ("Teamsters") and United Air Lines v. Evans, 45 U.S.L.W. 4566 (May 31, 1977) ("Evans").^{13/}

The decision below

The court below first held that the prior judgment, though certified as final by him pursuant to Rule 54(b), Fed.R.Civ.P. (A. 310; see also A. 586-87), could be vacated at his discretion pursuant to Rule 60(b)(1), (5) and/or (6), Fed.R.Civ.P., even though an appeal therefrom had been dismissed by this Court and the time for such appeal had expired. According to Judge Duffy, the pendency of the matter, in the absence of a final judgment disposing of the entire case, warranted his vacating the earlier judgment "so as to achieve justice" in view of Teamsters and Evans. A. 587-89.

Judge Duffy then interpreted Teamsters and Evans to be applicable and to require: (i) Title VII immunization of lay-offs pursuant to a facially neutral seniority system which perpetuates pre-Title VII discrimination (A.592-94); (ii) limiting Title VII

13.

^{13/} The motion of defendants was based, in part, upon the contention that the action is time-barred. On July 13, 1977, plaintiffs' counsel was notified by the EEOC that Alice McCain, a class member, filed charges with the EEOC on September 11, 1973, alleging sex discrimination in the PD's hiring practices. A. 577-78. Counsel apprised the District Court of this circumstance. Subsequently a right to sue letter was obtained and a seconded amended complaint, served by plaintiffs on defendants on August 29, 1977, includes the McCain charges. AD. 112-31.

hiring discrimination here to instances in which, and "when a male police officer is hired instead of a female who meets all requirements for appointment and has a higher test score" (A. 590-91, 594-95); and (iii) further limiting Title VII rights and remedies to instances of discrimination, as thus defined, occurring within 300 days of the filing of charges with the EEOC^{14/} (A. 591-92) and to class members hired after March 24, 1972, the effective date of extension of Title VII to public employers^{15/} (A. 594-95). For the class member who meets these Title VII tests, the "seniority date may be revised to the date when she would have been appointed but no earlier than March 24, 1972." A. 595.

On the §1983 aspect of the case, the court below held that the applicable statute of limitations was three years from June 26, 1975 when this action was filed. A. 569-96. The scope of §1983 was defined to cover the same acts of hiring discrimination as those referred to for Title VII purposes, and also the lay-offs to the extent that the proof did not "'bootstrap' a challenge to a pre-June 26, 1972 hiring practice simply by alleging that the effects of the earlier discrimination lingered until layoff." A. 595. The standard set for §1983 liability purposes was proof of sex-based distinctions without "substantial justification" and with "a discriminatory intent or purpose [as]...a motivating factor."

14.

^{14/} The 300 day filing requirement is fixed by 42 U.S.C. 2000e-5(e), Title VII §706(e) ["§706(e)"]. The court below left open the precise filing date in order to permit the parties to litigate out whether the June 25, 1975 filing by the plaintiffs Acha and Egan, or the September 11, 1973 filing by McCain is the proper date for measuring compliance with the 300 days filing requirement. A. 591-92.

^{15/} See Pub L. 92-261, §2, March 24, 1972, 86 Stat. 103.

A. 599. The court did not, as to §1983, limit relief or seniority date revision to any particular date as it did for Title VII purposes.

In applying the foregoing principles, the court below:

(i) vacated the earlier judgments, including the permanent injunctions in favor of class members (including the 61 rehired class members [see pp. 10-12 supra]) who had proven they were victims of past discrimination pursuant to the standards fixed by this Court in Acha, but denied the defendants' cross-motion for summary judgment, without prejudice, and maintained the injunctive relief in effect pendente lite as to the 61 rehired class members because of the Title VII and §1983 matters left open by the decision for further determination;

(ii) denied to plaintiffs and to defendants any other relief, including any injunctive relief for the 11 class members not previously the subject of a judgment or reinstatement injunction but who had been determined to be victims of PD hiring discrimination;^{16/} and

(iii) stayed all other pending motions and denied all other relief requested. A. 582-604.

15.

^{16/} All the factual determinations of sex discrimination by the Special Master in the Third, Fourth, and Fifth Interim Reports were confirmed by Judge Duffy. A. 603. However, the cases of the 11 class members found entitled to revised seniority dates by the Special Master, were remanded to the Special Master for new findings and conclusions consistent with the opinion. Ibid. Injunctive relief was this denied by Judge Duffy to the 11 class members as to whom he confirmed the Special Master's findings that they were the victims of PD sex discrimination in their hiring.

The appeal

Notice of appeal was filed on August 2, 1977 from all aspects of the decision below. A. 607. The plaintiffs moved in the District Court for a stay, pending appeal, of PD rehiring scheduled for August 5, 1977 unless in such rehiring the 11 class members were accorded the revised seniority dates fixed for them by the Special Master. AD. 16. Judge Duffy denied that motion, but directed the PD to maintain 11 vacancies until argument of the motion for such stay before this Court on August 16, 1977.

A. 610. This Court, by order dated August 16, 1977, granted the motion for the stay of PD rehiring, unless the revised seniority dates of the 11 class members were reflected in such rehiring, until the oral argument of the appeal.^{17/}

16.

^{17/} PD rehiring took place on August 5, 1977 and August 26, 1977 (AD. 73), but 9 of the 11 class members were not rehired (AD. 51) although they should have been if their revised seniority dates had been taken into account. Instead the PD has continued to comply with Judge Duffy's directive, not this Court's order, and has kept 11 PD vacancies unfilled.

Summary of Argument

It was an error for the court below to grant the Rule 60(b) motion to vacate the August 4, 1976 final judgment and the injunctive relief provided therein. Without exception, the cases and commentators specify that where an appeal from a final judgment was viable and the time to appeal has expired, the judgment may not be vacated under Rule 60(b) because the judgment was based on an error in law evinced in a later decision. No compelling consideration of equity or justice exists here to set aside the final judgment. Due regard for the enormous time and effort expended in implementation of the matters decided by that judgment, which are wasted by its vacatur, compels adherence to the doctrine of finality here.

Acha has not been overruled by Teamsters or Evans, as the court below effectively held. The basic Title VII violation here were the lay-offs, not the statutory seniority system. The lay-offs followed a lay-off roster, formulated on the eve of the lay-offs, which combined the separate titles of Patrolman and Policewoman with a readily anticipatable grossly disparate impact, to the prejudice of the women. Separate lay-off rosters for Patrolmen and Policewomen,--compatible with their separate statutory titles, tests, lists, appointments, assignments, and functions,--could legally have been utilized so as to equalize the percentage of men and women laid-off. The lay-off roster chosen was not justified by actual PD service seniority or any other business necessity. Moreover, the lay-offs as they occurred reflected past explicit sex discrimination in PD quotas of 2% women and the exclusion of women from the great majority of PD entrance level tests, which practices continued and were implemented throughout 1973. In the case

of 70 of the 72 class members involved on this appeal men with lower scores were appointed in 1973 before such class members. The McCain EEOC complaint, available to all the class members, was filed on September 11, 1973. In the circumstances neither Teamsters nor Evans sustains the ruling below.

Teamsters immunizes bona fide neutral seniority system perpetuation of pre-Title VII discrimination in the private sector,--here the lay-off roster is a discriminatory, not a neutral application of a seniority system; the discrimination complained of is post-Title VII; and the public, not the private employment sector is implicated, as is the unlawfulness of public as compared with private pre-Title VII discrimination in employment.

Evans held that the Title VII time-bar runs from the date of the Title VII violation complained of and is not extended by the continuation of the injury suffered as a result of the violation where the violation itself has ceased,--here the lay-offs in 1975 and the continuing acts of discrimination through 1973 are independent wrongs, not mere residual injuries, and the EEOC complaints filed by the named plaintiffs and McCain are therefore timely.

In any event, even under the Title VII standard adopted by the court below, 70 of the 82 class members were entitled to final injunctive relief reflecting revised seniority dates since those 70 all had test marks of 75% or better and were appointed after January 29, 1973, although men with test marks of 75% were appointed after January 29, 1973, although men with test marks of 75% were appointed on January 29, 1973.

Each of the 72 class members has proven that but for her sex she would have been hired at a substantially earlier date than

1973 or 1974 when they were hired. Each is therefore entitled to her rightful seniority date under §1983 irrespective of the availability of Title VII relief. Denial of PD employment on the grounds of sex is, as appears from the record here, not justifiable and therefore unconstitutional and violative of §1983. The decision of this Court in "Chance IV" holds that §1983 victims of discrimination, including those deterred from taking a discriminatory test, who are later appointed and then subject to excessing or lay-off, are entitled under §1983 to their rightful seniority in connection with such excessing or lay-off. The Chance IV holding expressly relied upon in Acha, squarely governs on the plaintiffs' §1983 claims. The denial of certiorari by the Supreme Court in Chance IV after Teamsters and Evans indicates that Chance IV remains intact.

Argument

I.

IT WAS ERROR FOR THE COURT BELOW TO GRANT THE RULE 60(b) MOTION BASED UPON TEAMSTERS AND EVANS EVEN IF THE EARLIER FINAL JUDGMENT HEREIN WAS ERRONEOUS IN THE LIGHT OF THOSE LATER DECISIONS.

In its order and opinion dated July 16, 1976, the court below denied defendants' cross-motion for summary judgment, which was predicated upon the defenses of the statute of limitations, laches, and lack of subject matter jurisdiction. A.307-08. In that same order and opinion (A.310-11), and in an order and partial summary judgment entered on August 4, 1976 (A.317-18), the court below directed the defendants to fix the seniority of 38 class members at a date no later than May 8, 1970. In the July 16, 1976 order and opinion, the District Court specified:

"There being no just cause for delay, partial summary judgment is granted as to the seniority status of the 38 female former police officers who took the October, 1969 exam and received a grade of 87% or higher. Rule 54(b), Fed. R. Civ. P." (A.310.)

Rule 54(b), Fed. R. Civ. P., thus referred to, sets out the manner in which a court may direct the entry of a final judgment as to fewer than all of the claims in a pending action:

"When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, or where multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties, only upon an express determination that there is no just cause for delay and upon an express directive for the entry of judgment."

The court below thus made the requisite Rule 54(b) certification of finality on July 16th, and judgment was entered on August 4, 1976. The express reference to Rule 54(b) on July 16th underscored

the nature of the certification for no other reason appears for such reference. The decision below here under review acknowledges that the earlier judgment was final and res judicata. A.586-87.

Defendants appeal from the final judgment was dismissed by this Court for failure to docket the appeal. A.322. No stipulation of dismissal was filed, nor was defendants' withdrawal made by motion upon notice to plaintiffs pursuant to Rule 42(a), Fed. R. App. P. This Court was, in the circumstances, expressly authorized to dismiss the appeal [Rule 3(a), Fed. R. App. P.], and as no other appeal was sought to be taken by defendants, the judgment involved stands as final and no longer appealable.

The matters thus resolved by final and no longer appealable judgment herein include the very matters now decided by the court below in a manner contrary to their prior resolution. Defendants, in their pre-argument statement in their appeal from the judgment, raised the precise defenses now vindicated by the District Court: "laches, [the] statute of limitations, and subject-matter jurisdiction." AD.40. The doctrine of res judicata, which bars relitigation of a final judgment, is too-well established to require lengthy citation of authority. See generally, 1B Moore's Federal Practice III(a). Absent Rule 60(b) exoneration from the res judicata effect of the final judgment herein, that judgment foreclosed the decision below here under review which admittedly opens, relitigates, and reverses the resolution of the issues settled by such judgment.

The finality of the earlier judgment affects all the parties,--the defendants, the class members designated in the judgments, and all other class members. The defense of laches, statute

of limitations, or subject matter jurisdiction implicated by Teamsters and Evans may not be invoked to avoid claims by any class member, including the 11 class members. The doctrine of res judicata is available to all members of the class,--here duly certified as a Rule 23, Fed. R. Civ. P., class (A.306-07),--so that the earlier final judgment is binding upon defendants who were parties to the proceeding resulting in the final judgments. 3B Moore's Federal Practice ¶23.11[5]; see also Note, 87 Harv. L. Rev. 589 (1974). It has here been specifically found and held that "any relief ultimately granted will apply to the class as a whole." The uniformity of judgment contemplated by Rule 23, Fed. R. Civ. P., mandates the applicability of the res judicata effect of the final judgment herein to all members of the class.

Rule 60(b), Fed. R. Civ. P., relied upon by the court below, does not authorize that court's determination to set aside the final judgment. For the authorities establish that Rule 60(b) may not be used to substitute for an appeal from a final judgment as to which the time to appeal has expired, where a timely appeal was viable. Ackerman v. United States, 340 U.S. 193 (1950); International Controls Corp. v. Vesco, 556 F. 2d 665 (2d Cir. 1977); Schildhaus v. Moe, 335 F. 2d 529 (2d Cir. 1964); 7 Moore's Federal Practice ¶60.18[1], ¶60.27[1].

It is not clear from the opinion below which sub-section of Rule 60(b) is relied upon. See A.588-89. However, whether the District Court was invoking Rule 60(b)(1) (relief from a judicial "mistake"), or Rule 60(b)(5) ("no longer equitable that the judgment should have prospective effect"),^{18/} or Rule 60(b)(6) ("any other

22.

^{18/}Teamsters and Evans will not sustain a Rule 60(b)(5) motion on the grounds of "a prior judgment on which it [the challenged judgment] is based has been reversed or otherwise vacated," since

(Continued)

reason justifying relief"), the decision below was reversible error. Any Rule 60(b) motion must be made "within a reasonable time," and a Rule 60(b)(1) motion must be made "within a reasonable time, and...not later than one year after the judgment, order, or proceeding was entered or taken." 7 Moore's Federal Practice ¶60.22[4]. The one year maximum for a Rule 60(b)(1), (2), or (3) motion does not supersede the general requirement that any Rule 60(b) motion be made within a reasonable time. Id. at ¶60.18[8]. And a "reasonable time for relief from an error of law by the court should not exceed the time allowed for an appeal." Id. at ¶60.22[4]. Defendants' Rule 60(b) motion was therefore defective because it was not made within their time to appeal from the judgment.

The limits on the use of a Rule 60(b) motion were set by the United States Supreme Court in Ackermann v. United States, supra. In Ackermann judgment had been entered against three persons in a denaturalization proceeding. One chose to appeal the decision, and was successful in his appeal. Subsequently the other two petitioners moved for relief pursuant to Rule 60(b)(6). The Supreme Court held:

"Petitioner cannot be relieved of such a choice [deliberate choice not to appeal] because hindsight seems to indicate to him that his decision...was probably wrong...There must be an end to litigation someday, and free, calculated, deliberate choices are not to be appealed from." (340 U.S. at 198.)

23.

(Continued)

the judgment in Acha was not reversed or otherwise vacated in Teamsters or Evans. The only reference to Acha in the majority opinions in either case, is with approval. Teamsters at 4517.

Similarly in Polites v. United States, 364 U.S. 426 (1960), in a case where an intervening Supreme Court decision was alleged to have brought a change in decisional law, the Supreme Court reaffirmed "the relevant and persuasive force of Ackermann" (364 U.S. at 433) that a deliberate choice not to appeal could not be evaded by a Rule 60(b) motion.

The opinion of Judge Friendly in Schildhaus v. Moe, supra, is to like effect as to the ineffectuality of a Rule 60(b) motion, based upon a mistake of law evidenced by a later decision, to set a judgment aside after the time to appeal therefrom had expired. When Schildhaus was first before the Second Circuit, the Court indicated that a portion of the judgment not appealed was lacking in support in the record. The non-appealing party thereupon successfully moved in District Court under Rule 60(b) to vacate the judgment. This Court reversed. Judge Friendly wrote:

"...nothing in the Rule, the cases, or the treatises suggests that a motion for relief from judicial error more than eight months after the entry of judgment is made 'within a reasonable time' as the Rule requires. 'Rule 60(b) was not intended as a substitute for a direct appeal from an erroneous judgment.' Hartman v. Lauchli, 304 F. 2d 431, 432 (8 Cir. 1962); Wagner v. United States, 316 F. 2d 871 (2 Cir. 1963). Professor Moore says that a reasonable time for making a motion under Rule 60(b) on the basis of judicial error should not exceed the time allowed for an appeal. Ibid. at 239. Cf. Sleek v. J.C. Penney Co., 292 F. 2d 256 (3 Cir. 1961)." (Id. at 531.)

Moore's Federal Practice thus referenced by Judge Friendly reads as follows:

"Like 60(b) generally, clause (6) cannot be used as a substitute for appeal. Absent exceptional and compelling circumstances, a party will not be granted relief from a judgment under clause (6) even though relief from the judgment might have been obtained had an appeal been taken, where an appeal had been taken but was dismissed because not perfected, [citing Gilmore v. Hinman, 291 F. 2d 652 (D.C. Cir. 1961)], or because it was untimely, where the party now moving

made an informed and intelligent decision to stipulate a dismissal of the appeal albeit the decision subsequently appears unwise. (Id. at ¶60.27[1].)

More recently, in International Controls Corp. v. Vesco, supra, this Court confirmed the cited view of Judge Friendly. The District Court there had denied a Rule 60(b) motion to vacate a judgment, made on the grounds of a mistake [Rule 60(b)(1)], where the time to appeal had expired. This Court affirmed. Judge Oakes wrote:

"While the latter's [Rule 60(b)(1)] reference to 'mistake' has been held to include mistakes by the district court, see Tarkington v. United States Lines Co., 222 F.2d 358, 360 (2d Cir. 1955) (Frank, J.); 11 C. Wright & A. Miller, supra, §2858, at 176 (1973), a motion for relief from such judicial mistakes under Rule 60(b)(1) may not be made after the time for appeal has elapsed, see Schildhaus v. Moe, 335 F.2d 529, 531 (2d Cir. 1964), at least if the mistake alleged is of a substantive legal nature, see 11 C. Wright & A. Miller, supra, § 2858, at 178.

"...appellant's own characterization indicates that the Rule 60(b)(1) motion must be rejected, because it was made after the expiration of the time for appeal from the judgment." (556 F.2d at 670.)

The Court also dismissed the Rule 60(b)(6) branch of the motion for the identical reason that it was brought after the time to appeal had expired and the District Court had

"found that appellant had actual notice of the entry of judgment five days before the time for appeal expired and had constructive notice at least some twenty days in advance. Appellant does not here challenge these findings, which led the district court to conclude that appellant's failure to file a timely appeal was not excusable." (Id. at 671.)

Our research discloses that the uniform and undeviating construction of Rule 60(b), including Rule 60(b)(5) and (6), is, as stated by Judge Weinfeld, that it "does not apply where a case relied upon as precedent by the court in rendering the...judgment

has since been reversed." Wallace Clark & Co., Inc. v. Acheson Industries, Inc., 394 F. Supp. 393, 395 n.4 (S.D.N.Y. 1975), aff'd, 532 F. 2d 846 (2d Cir. 1975), cert. den. 425 U.S. 976 (1976); see also Loucke v. United States, 21 F.R.D. 305, 307-08 (S.D.N.Y. 1959). Rule 60(b) may not be used as a substitute for appeal and, therefore, may not be granted to correct an error of law, even where manifested by a supervening decision, after the time to appeal has expired. This is the rule according to the Supreme Court, the Second Circuit and its District Courts, as we have indicated, as well as every other Circuit which has dealt with the issue,^{19/} and the commentators.^{20/} No case or authority was cited by the court below to sustain its view of Rule 60(b). Instead Judge Duffy said he was "not unmindful of prior teachings of this Circuit [referring to an opinion of Judge Friendly] nor of the commentaries of learned professors [referring to Prof. Moore]," but was otherwise constrained here by the need "to achieve justice." A.589.

26.

^{19/}Lubben v. Selective Service, 453 F. 2d 645 (1st Cir. 1972); Sleek v. J.C. Penney Company, 292 F. 2d 256, 258 (3rd Cir. 1961); Meadows v. Cohen, 409 F. 2d 750, 752 fn. 4 (5th Cir. 1969); McDowell v. Celebrezze, 310 F. 2d 43, 44 (5th Cir. 1962); Berryhill v. United States, 199 F. 2d 217, 219 (6th Cir. 1952); Hoffman v. Celebrezze, 405 F. 2d 833, 836 (8th Cir. 1969); Title v. United States, 263 F. 2d 28, 31 (9th Cir. 1959); cert. den. 359 U.S. 989 (1959); Gila River Ranch, Inc. v. United States, 368 F. 2d 354, 357 (9th Cir. 1966); Collins v. City of Wichita, 254 F. 2d 837, 839 (10th Cir. 1958).

^{20/7} Moore's Federal Practice, ¶¶60.18[1],[8], 60.22[4], 60.27[1]; 11 C. Wright & A. Miller, Federal Practice and Procedure (1973) §2863.

Rule 60(b)(5) or (6) has, in the interest of remediating a grievous wrong or inequity, been held applicable, after the time to appeal has expired, where the prior judgment was based upon a statute,^{21/} or a statutory equivalent such as an agency rule or regulation,^{22/} which was later deleted or amended. In such a case the failure to prosecute a futile appeal is not necessarily a bar to Rule 60(b) relief. Similarly, Rule 60(b)(6) may be available where a litigant is unable with due diligence to prosecute an appeal. See International Controls Corp. v. Vesco, supra, at 670-71. But no such futility or inability to process an appeal existed here when the appeal of defendants was dismissed. Teamsters and Evans reversed no Supreme Court decision which, prior to Teamsters and Evans, rendered defendants' appeal non-viable. Assuming the prior final judgment herein is shown by reason of Teamsters and Evans to be mistaken in its view of Title VII, that error could have been rectified by prosecution of their appeal by defendants, and the defendants' failure to do so stands on no better footing than like failure in all of the Rule 60(b) cases already cited.

The court below was wrong to believe that Rule 60(b) was available because the court was "exercising active and continuing jurisdiction over the suit." A.589. The same continuing jurisdiction exists in every Rule 60(b)(5) motion, which explicitly deals with the future operation of an equity judgment over which a court of equity has inherent continuing jurisdiction, and the Rule 60(b) authorities we have cited include Rule 60(b)(5) motions.

Nor do the defendants,--who have been adjudicated to have discriminated against women in the PD and seek to deny rights and

27.

^{21/}System Federation v. Wright, 364 U.S. 642 (1961); Pennsylvania v. The Wheeling and Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855).

^{22/}Class v. Norton, 507 F. 2d 1058, 1061-62 (2d Cir. 1974).

remedies for such women on the technical time-bar considerations underlying Teamsters and Evans,--call into play the governing purpose of Rule 60(b)(6) to remediate a decree which "has been turned through changing circumstances into an instrument of wrong" (United States v. Swift & Co., 286 U.S. 106, 115 [1932]), upon a clear showing "of grievous wrong evoked by new and unforeseen conditions" (id. at 119). The court below considered that "justice" required vacating the prior judgment herein because "to do otherwise might create the anomalous situation in which the first 38 women reinstated pursuant to the grant of partial judgment would not be affected by Evans and Teamsters, but those reinstated thereafter in March 1977, would be." A. 589. Plainly Judge Duffy overlooked the entitlement of all the class members, not just the "first 38," to the benefit of the res judicata effect of the prior final judgment which would make Evans and Teamsters inapplicable to all, not just "the first 38" class members. See pp. 21-22 , supra. If parity of treatment of class members is the compelling component of the "equity" or "justice" which, for the court below, overrides "prior teachings of this Circuit" and "the commentaries of learned professors" (A. 589), such parity is as equally served by according finality to, as by vacating the prior judgment.

If precedent and authority as to the scope of Rule 60(b) are to be set aside in the interest of justice and equity because, according to the court below, "[t]he continued growth and viability of our common law demand no less" (A. 589), then it is relevant to note that the Rule 60(b) motion here came after 150 individual hearings, extending over 50 days of trial, comprising 9000 pages of testimony, and numerous District Court motions, hear-

ings, arguments, and decisions. The costs in time and money have been staggering and, if the ruling below is sustained, they could have been avoided if defendants had prosecuted their appeal. Moreover, the ultimate thrust of defendants' motions and the imminent impact of the decision below is to deny the revised seniority dates granted even to those 61 class members who were named in and rehired by reason of the judgments of August 4, 1976 and March 26, 1977. This could result in the loss of revised seniority dates and the lay-off of many such rehired class members.

Finality of judgments avoids wasting valuable judicial and other resources, and insures the fulfillment of reasonable expectancies created by judgments. The doctrine of res judicata is "[s]purred by considerations of judicial economy, and a public policy that favored injecting certainty into the legal system..." Expert Electric, Inc. v. Levine, 554 F.2d, 1227, 1232 (2d Cir. 1977). These values are both implicated here and more fully supply the considerations of equity and justice than does the decision below.

II.

IT WAS ERROR TO VACATE AND TO DENY TITLE VII INJUNCTIVE RELIEF TO CLASS MEMBERS WHO ESTABLISHED THAT THEY WERE VICTIMS OF PD SEX DISCRIMINATION.

The complaint alleges that the June 30, 1975 PD lay-offs violate Title VII because, by perpetuating past PD discrimination against women, the lay-offs impacted in a grossly disparate manner upon FPW. The factual premises for these propositions are not substantially in dispute. This Court sustained the conclusion that the disparity in the lay-offs, resulting from prior sex discrimination in PD hiring, established the Title VII violation and remanded to the District Court to determine the Title VII relief to be accorded to individual class members who could demonstrate^{23/} whether and when they were the victims of sex discrimination.

On remand the District Court originally adhered to the mandate of this Court that the lay-offs constituted the Title VII violation, and accorded injunctive relief to the FPW who proved whether and when they would have been sooner hired but of their sex. After Teamsters and Evans, however, without any contravening mandate of this Court, the lower court held that "the June 1975 layoffs pursuant to a facially neutral seniority system were immunized and cannot be the basis for a Title VII violation."^{24/} A. 594.

30.

^{23/} In Cates v. Transworld Airlines, 15 FEP Cases 329, 334 (2d Cir. 1977) ("Cates"), this Court noted that it had not separately discussed the "violation" and "remedy" issues in Acha. In Cates "only one unlawful employment practice was alleged - discriminatory refusal to hire." Cates at 336. In Acha the disparate lay-offs were the violation alleged by plaintiffs and sustained by this Court, and the date of discrimination in hiring, as to which the remand was directed in Acha, dealt with the "remedy" issue.

^{24/} The court below did, however, hold that "plaintiffs may... attempt to prove that the layoffs themselves were violative of sec-1983." A. 594. It is difficult to understand how lay-offs violative of §1983 can be immunized for Title VII purposes.

The only Title VII violations left open by the court below are individual instances of discriminatory hiring,--the remedy rather than the violation contemplated by this Court in Acha,--without any indication of the remedy to be provided in such cases. Since the cut-off seniority date for the June 30, 1975 lay-off purposes was April 1, 1971 (A. 476), and the earliest Title VII revised seniority date authorized by the court below is March 24, 1972 (A. 595), the lay-offs are immunized by the District Court individually as well as generally. The court below has, therefore, effectively transmuted this case from one of sex discrimination in the June 30, 1975 lay-offs to one of sex discrimination in PD hiring thereby overruling this Court's ruling in Acha and rendering irrelevant the Title VII factual issues specified by this Court which were the subject of the 150 hearings before the Special Master.^{25/} Teamsters and Evans do not authorize the lower court's radical revision of this Court's mandate, and adherence to that mandate would have dictated permanent injunctive relief for the 72 class members.

A.

Teamsters, even if applicable, does not reverse Acha.

Teamsters involved actions brought by the United States, exclusively under Title VII, against a private employer and a union of its employees charging discrimination against Blacks and Hispanics

^{25/} The sole act of Title VII discrimination specified by the court below is the PD hiring of a male before the hiring of a woman with a higher test score. A. 590-91, 594-95. The standard set by this Court in Acha and the basis of the hearings before the Special Master is the broader one of the earliest date a FPW would have been hired but for her sex.

in the hiring, assignment and promotion of so-called line drivers. The Supreme Court, in dealing with the interaction of Title VII and seniority, first established that the Title VII legal effect of a bona-fide non-discriminatory seniority system which perpetuates pre-Title VII discrimination was an open question for the Court. Id. at 4511-12. The Court made clear that the issue presupposed a non-discriminatory seniority system which "did not have its genesis in racial discrimination, and...was negotiated and has been maintained free from any illegal purpose." Id. at 4514; see also 4511 n.28. In Evans the seniority system was sustained because it was "neutral in its operation" (Evans at 4567), and it was held that 42 U.S.C. §2000e-2(h), Title VII §703(h) ["§703(h)"] "does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory" (id. at 4568).

The Court then reaffirmed the principle of Griggs v. Duke Power Co., 401 U.S. 424 (1971), that any practice, even if neutral on its face, is violative of Title VII if it freezes past discrimination, and that, but for §703(h), the seniority system in Teamsters would come within "the Griggs rationale." Teamsters at 4512. But the Court read the legislative history of §703(h) to immunize the perpetuation of pre-Title VII discrimination by a facially neutral seniority system. Id. at 4512-14. The Court's language in this regard refers solely and exclusively to the Congressional purpose to preserve intact the competitive-type seniority rights^{26/} of those em-

^{26/} As there was no issue in Teamsters concerning the effect of §703(h) on benefit-type seniority (salary level, vacation, pension, fringes, etc.) (id. at 4511), which does not implicate the "vested seniority rights" of others, Teamsters does not decide or deal with the immunizing effect of §703(h) as against the discriminatory employer.

ployees in competition with pre-Title VII discriminatees:

"In sum, the unmistakable purpose of §703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII. As the legislative history shows, this was the intended result even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes. Although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in such cases, the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.... Accordingly, we hold that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination. Congress did intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees." (Id. at 4513.)

The lay-offs here, however, perpetuated,--through the seniority system as applied on June 30, 1975,--not pre-Title VII (i.e., March 24, 1972) but post-Title VII PD discrimination, and in Teamsters it was expressly acknowledged that §703(h) did not immunize seniority perpetuation of post-Title VII discrimination. Teamsters at 4511-12; see also Franks v. Bowman Transportation Co. 424, U.S. 727 (1976) ("Franks"); United States v. Trucking Employees, BNA, Daily Labor Report, No. 129, July 5, 1977, D-1, at 4 n.23 (D.C. Cir. 1977). From 1970 to January 1973 no women were appointed to the position of Patrolman; a minimum of 130 men were appointed in that period, including 46 appointed after the effective date of Title VII, March 24, 1972. A. 526-28. Virtually all the FPW, members of the class, were appointed in the period from and after January 29, 1973. A. 528-29. Similarly, 4,236 males were appointed from and after

January 29, 1973 up to September 27, 1974, many of whom were not laid-off.^{27/} See pp. 3-5 supra; see also A. 528-30. Virtually all these appointments were made from pre-1972 examinations which expressly and concededly discriminated against women. A. 529-30. For this reason, as this Court noted in Acha, by "June 1975, the percentage of female police officers was 2.62 per cent." 531 F.2d at 650. The post-March 1972 appointments, which include almost the entirety of the class here, were based upon and perpetuate the pre-March 1972 discriminatory examination process. A. 529. Such post-Title VII perpetuation of pre-Title VII discrimination is unlawful even under Teamsters. However immunized a seniority system which perpetuates pre-Title VII discrimination may be because of Teamsters, no such immunity exists as to a selection process which thus perpetuates past discrimination in PD examinations. Teamsters expressly retained the efficacy of Griggs as to non-seniority system discrimination perpetuating devices. Teamsters at 4512. The District of Columbia Court of Appeals correctly read Teamsters to confirm the Griggs rationale that Title VII is violated by the "operation of any neutral practice, other than the seniority system [sic], that perpetuated the effects of the prior act of neutral discrimination." U.S. v. Trucking Employers, Inc., supra, at D-4.

In addition, it is clear that the process as well as the product of the June 30, 1975 lay-offs was discriminatory in nature.

34.

^{27/} Teamsters frequently and explicitly referred in its construction of §703(h) to the statutory purpose and intent to safeguard seniority rights which accrue and vest pre-Act. Teamsters at 4512-14. The Court stated the issue to be review of "the judgment that the seniority system unlawfully perpetuated the effects of pre-Act [sic] discrimination." Id. at 4512. It is, therefore, here significant that the seniority rights protected against FPW discriminatees by the court below under Teamsters, involve post-March 24, 1972 male appointees.

For lay-off purposes the PD used a single, merged list of men and women members of the uniformed force, although virtually all of the men and women laid-off: (i) had taken separate tests^{28/} which were confined to men and women, respectively;^{29/} (ii) had been placed on lists which were separate and confined to men and women, respectively;^{30/} (iii) when appointed, had received separate identification cards as "Patrolman" and "Policewoman," respectively (A. 536-37, 551-52); (iv) when assigned after appointment, had served in differing capacities by reason of the substantial matron duties performed by women exclusively (A. 543-44, 547; AD. 89-90, 107-11); and (v) when competing as to assignments and vacations, seniority for women was frequently based upon the relative seniority of other women, not men (A. 537-38, 547).

At all times the applicable law expressly provided for separate titles for Patrolmen and Policewomen, with duties and eligibility differing in material respects, as appears from New York City Administrative Code §§434a-1.0 and 2.0:

"§434a-1.0 Composition of force.-Until otherwise provided by the mayor, upon the recommendation of the commissioner, the police force in the police department, shall consist of the following members, to wit: (Opening par. amended by L. 1963, ch. 100, §385.)

35.

^{28/} Only a very small number of those laid-off on June 30, 1975 came from the 1973 unisex PD test, and all or virtually all of those appointed from that test were males. A. 531.

^{29/} Civil Service Law §50(7) authorizes separate tests by sex where custody or care of persons of the same sex is involved.

^{30/} Civil Service Law §60(2) permits certification by sex even from a uni-sex list where custody or care of persons of the same sex is involved.

1. Captains of police, not exceeding in number one to each fifty of the total number of patrolmen, in addition to the number detailed to act as inspectors;
2. Lieutenants of police, not exceeding four in number to each fifty of the total number of patrolmen;
3. Sergeants not exceeding six in number to each fifty patrolmen; . . .
7. Patrolmen to the number of seven thousand eight hundred thirty-nine.

§434a-2.0 Policewoman.-a The commissioner is hereby authorized to appoint and, within the amounts appropriated therefor to provide for the compensation of women police officers, for the increased moral protection of women and minors, for the prevention of delinquency among such women and minors, and for the performance of such other duties as he may assign to them....

b. So far as the same are applicable the provisions of the charter governing the police department and the provisions of such charter relating to salaries, pensions, appointments and removals^{31/} of members of the police force shall apply to policewomen appointed in like manner and extent as to policemen.

c. There shall hereafter be but one rank and grade of women police officers in the uniformed force of the department and they shall be known as policewomen." (Emphasis added).

The alleged PD April 23, 1973 merger of the separate ranks (see AD. 69-79) is of no significance. The quoted provisions of law were never changed and obviously prevailed. The September 5, 1973 Notice of Examination No. 3014 for a "unisex" test, much relied upon by the defendants (A. 270-71), was specifically and officially designated as a test for "PATROLMAN-POLICEWOMAN" and speaks of the test as "one designed to test the candidates' capacity to learn the work of a Patrolman or a Policewoman." Plaintiffs' General Exh. 3 before Special Master (emphasis added). At the June 30, 1975 hearings before Judge Duffy, the defendants stipulated that the titles were not merged for budgetary purposes (A. 84), and

^{31/} The Charter does not deal with lay-offs.

other official action to the same effect is in the record (A. 572-73, 579-81; AD. 37-39). The June 30, 1975 PD roster distinguished between male and female officers. A. 23. Identification cards issued to women as late as May 1973 referred to them as "Policewoman," and not until May 1975, one month before the lay-offs, were such cards changed to refer to "Police Officer." A. 536-37. Seniority for vacation pick purposes is and was calculated as between Policewomen and Patrolmen in the same squad or precinct. A. 537-38, 547. In 1976-77 PD assignment sheets, rosters, sick reports, etc., continued to distinguish between Police Officers and Female Police Officers. AD. 89, 97-106. In April 1977 the New York City Human Rights Commission found probable cause that the PD was guilty of sex discrimination against Policewomen because of their assignment to matron duty rather than to the full range of law enforcement duties performed by men. AD. 89-90, 107-11; see also A. 269-70.

The described differentiations of men and women members of the PD uniformed force is here critical. The seniority referenced by Civil Service Law §80(1) governing lay-offs is applied to "incumbents holding the same or similar positions." It was, therefore, within the discretion of the defendants here whether lay-offs on June 30, 1975 would be based upon separate or merged lists of the Policewoman and Patrolman titles. Women in the PD uniformed forces clearly were incumbents of the "same" Policewoman title which was not necessarily the "same" as the Patrolman title, and the Policewomen therefore could constitute a separate lay-off unit. Precisely such separate lay-off lists of male and female health and physical education teachers were established and implemented by the New York

City Board of Education in the 1975 excessing and lay-offs of such teachers. See Board of Education v. Califano, et al. S.D.N.Y. Civ. No. 77/609, complaint at 4-6. A similar device was approved by the Washington State Human Rights Commission. 1 Wom. L. Rep. 1,186 (April 1, 1975). The Report of the United States Commission on Civil Rights, Last Hired First Fired: Layoffs and Civil Rights (February 1977) at 64, proposed the following technique to avoid the disparate impact of lay-offs on newly hired discriminatees:

"Separate seniority lists for layoff purposes --one for minorities, one for women, and one for nonminority males--should be designated as another possible technique. No employee would be placed on more than one list; minority women, for example, would be placed on either the minority or female list, whichever had the fewest employees. Layoffs would proceed in reverse order of seniority by the percentages in the employer's work force existing at the time layoffs begin. Under this plan, if the employer's work force was 10 percent women, 10 percent minorities, and 80 percent nonminority males, the first 10 employees laid off would be the 8 nonminority males with the least seniority and one each of the women and minority males with the least seniority."

The issue whether to use a merged list in the PD was not considered until the end of 1974. A. 486. If Civil Service Law §80(1) did not mandate the use of separate lists, it surely did not prevent such separate lists for lay-off purposes.^{32/} Sometime in 1975 the decision was apparently made by the defendants to treat the titles as merged for lay-off purposes. When that decision was made it was either known or must have been known that separate lists would have meant a lay-off of less than 25% of the women members

^{32/} Such discretion was not foreclosed by the alleged April 23, 1973 merger of ranks. The provisions of the Administrative Code still specified separate titles. If the alleged 1973 merger of ranks was a constraint, the same authority, if any, which permitted the merger could have permitted the separation of the ranks as a predicate to separate lay-off lists.

of the force so that the percentage of such women in that force would remain constant, and that a single lay-off list meant, according to this Court, the lay-off of almost 75% of those women so as to reduce very substantially their percentage of the force. 531 F.2d at 650.

The choice made was clearly not the product of a fixed, pre-existing seniority system as in Teamsters. It was, rather, the choice of a seniority system in contemplation of imminent lay-offs and with certain knowledge of its highly disparate and discriminatory impact. Nor was the choice which was made with such knowledge any more a function of necessity than it was a function of the law. Work-sharing arrangements by all PD members, instead of lay-offs of some, were strongly urged as an alternative to save funds without the anticipatable disparate impact of lay-offs on newly hired minorities and women.^{33/} And no one suggests that the law enforcement mission of the PD was better served by the disparate lay-offs of women. On the contrary, the recent City Human Rights Commission finding of probable cause of PD sex discrimination confirms that the unique roles performed by women in the PD uniformed forces were substantially impaired by their disparate lay-offs. AD. 107-11; see also A. 290. Not even greater length of actual service in the PD was the basis for using a single lay-off list since the greater seniority of men on the lay-off list as compared with the women was a function of the

^{33/} See Blumrosen & Blumrosen, "Layoff or Work Sharing: The Civil Rights Act of 1964 in the Recession of 1975," 1 Employee Relations Law Journal 2, 23-24 (1975), setting out the proposals of the New York City Human Rights Commission of money-saving options to avoid lay-offs with discriminatory impact.

statutory veterans' credit of the men, not their longer PD service.

A. 286-87. If discrimination was not the only plausible explanation of the manner in which women were selected for lay-off from the PD, it was at least the most probable one.

This, then, is precisely the seniority system with "its genesis in discrimination" proscribed by Teamsters and Evans, rather than the kind of bona fide seniority system which §703(h) permits to immunize pre-Title VII discrimination. The EEOC has interpreted Teamsters construction of §703(h) to be applicable only to a seniority system instituted prior to the effective date of Title VII. EEOC Interpretative Memorandum, July 27, 1977, 95 LRRM 234,235. The seniority system here involved not only was effectively constructed for the purposes of the June 30, 1975 PD lay-offs, but was so then constructed with knowledge of a grossly disparate impact and adopted in lieu of other PD money-saving devices less prejudicial to Police-women in their impact. The lay-off selection system here utilized, rather than validating prior, pre-Title VII discrimination, escalated such prior discrimination as a matter of law as well as fact and is not immunized by Teamsters.

B.

Teamsters is not here applicable because Teamsters dealt with pre-Title VII discrimination which was not unlawful when it occurred.

Teamsters dealt with discrimination by a private employer and union. The Supreme Court, in holding that employees who suffered only pre-Act discrimination are not entitled to relief under Title VII and that no person may be given retroactive seniority pursuant to Title VII to a date earlier than the effective date of the Act,

relied exclusively on the legislative history of Title VII. This legislative history reflected the concern that existing seniority rights, which were the product of prior discrimination which was not unlawful at the time it occurred,^{34/} not be affected by Title VII. On the basis of what it construed to be the intent of the Congress that enacted §703(h) of Title VII in 1964, the Court held that:

"...an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination. Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise these rights, even at the expense of pre-Act discriminatees." (*Id.* at 4513.)

The employees in Teamsters with vested seniority rights accrued such seniority prior to the effective date of Title VII, at which time discrimination by a private employer was not considered illegal.

The above principles have no application here where the prior intentional discriminatory practices were at all times unlawful pursuant to §1983 and the Fourteenth Amendment to the Constitution. In Teamsters the Court indicated that retroactive seniority could be awarded back to 1965, the date that the employer's discriminatory practices first became illegal. The legislative history to the 1972 amendments to Title VII,^{35/} however, demonstrates that Congress recognized that discrimination by a public employer

41.

^{34/} The applicability of §1981 to private discrimination was not recognized until the decision of the Supreme Court in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

^{35/} While the Court in Teamsters felt it was free to ignore the 1972 legislative history in a case involving a private employer (*id.* at 4513 n. 39), that history cannot be so ignored in a case involving a public employer, as it was the 1972 legislation which first created the rights of public employees to utilize the remedies of Title VII.

had been illegal since the enactment of the Fourteenth Amendment, and that by extending Title VII to cover state and local governments, it was merely providing an additional remedy by which victims of discrimination would challenge employment practices which were unlawful apart from Title VII. H.R. Report 92-238, 92d Cong., 1st Sess. (1971) at 18-19; S. Report 92-415, 92d Cong., 1st Sess. (1971) at 9-11.

Congress, therefore, in passing the Equal Employment Opportunity Act of 1972, which extended the protection of Title VII to employees of state and local governments, intended to provide employees of state and local governments with an alternative remedy for combatting discriminatory employment practices which were already unlawful, and capable of remediation through other more cumbersome federal remedies. Unlike Teamsters, to grant class members retroactive seniority here to a date prior to the effective date of Title VII will not jeopardize seniority rights of other employees which were obtained through discriminatory practices which were lawful at the time they occurred; the practice of the PD in maintaining a quota limiting the number of women who could enter the PD was at all material times unlawful under §1983 and the Fourteenth Amendment to the United States Constitution.

The decisions in this Circuit indicate that pre-Title VII discrimination which was unlawful when it occurred is remediable under Title VII. When Title VII was extended to public employers in 1972, this Court held it was not retroactive only so far as new substantive rights were created in 1972. Popkin v. New York State, etc., 547 F.2d 18, 20 (2d Cir. 1976) cert. den. 45 U.S.L.W.

3822 (June 20, 1977). ("The 1972 amendments to Title VII have no retroactive effect where they create new substantive rights" and "No fourteenth amendment claim has been raised by appellant here"); Weise v. Syracuse University, 522 F.2d 397, 410-11 (2d Cir. 1976); Monell v. Dept. of Soc. Services, etc., 532 F.2d 259, 261-62 (2d Cir. 1976). But where the 1972 Title VII amendments did not substantially augment pre-existing Fourteenth Amendment or §1983 rights or remedies, as is the case here, this Court squarely held the 1972 Title VII amendments to be retroactive. Brown v. General Services Administration, 507 F.2d 1300 (2d Cir. 1974), aff'd., 421 U.S. 987 (1975).

The recent decision of the Supreme Court in Hazelwood School District v. United States, 45 U.S.L.W. 4882 (1977), which held Title VII not applicable to pre-Title VII discrimination in an action brought by the United States against a public employer, is consistent with our reading of Teamsters. Hazelwood was a pattern and practice suit brought by the Attorney General. As the jurisdiction of the Attorney General in such cases is limited to Title VII violations (42 U.S.C. §2000e-6), the illegality of the practices of defendants prior to the effective date of Title VII to public employers was not in issue. For prior to Title VII the Attorney General has no right or authority to sue for the violation of constitutional or statutory rights by public employers who discriminated; accordingly, for purposes of pre-Title VII discrimination, the situation of the Attorney General in Hazelwood was the same as the private employer in Teamsters, neither of whom could complain of pre-Title VII discrimination.

The plaintiffs here, therefore, are not barred from challenging the legality of defendants' pre-Title VII violations of §1983 and the Fourteenth Amendment. Hazelwood, as Teamsters, does not deal with the effect of §703(h) when it perpetuates pre-Title VII unlawful discrimination, and on that issue we believe the legislative history of the 1972 Title VII amendments is clear to the effect that discrimination-perpetuating devices were intended, by that time, to be proscribed. Since it was the 1972 congressional purpose to extend Title VII remedies to discrimination then already perceived by the Congress to be unconstitutional and unlawful, it is implausible to suppose that it was intended that such remedies be unavailable as to past and existing unlawful discrimination by public employers. Nothing of such a restrictive nature or intent is to be found in the history of the 1972 amendments, and the congressional effort to achieve parity of remediation in cases of discrimination in public and private employment would be seriously impaired if private employer discrimination from 1965 to 1972 was remediable under Title VII, but not public employer discrimination during that same time.

C.

Neither Evans nor Cates time-bars
Title VII rights here.

Evans and Cates both hold that §706(e)^{36/} runs from the time of the wrong complained of, and that that time is not extended

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^{36/} Here §706(e) requires the filing of a discrimination complaint with an appropriate agency within 300 days of the discrimination.

by the continuation of the injury sustained as a result of that wrong. The central teaching of Evans and Cates is that the violation, for §706(e) purposes, is the wrongful discrimination, not the residual injury of that discrimination. Neither Evans nor Cates holds that a continuation of the wrongful discrimination,--not merely the continuation of the injury after the discrimination has terminated, as was the case in Evans and Cates,--is time-barred because the wrongful discrimination commenced at a time barred by §706(e). Evans and Cates do not bar a present continuing wrong, only a present continuing injury resulting from a time-larred violation, and the complaint here is of the current and continuing wrong of the June 30, 1975 lay-offs based upon the 1975 discriminatory merger of titles for lay-off purposes and the 1973-74 discriminatory hiring from discriminatory eligibles lists. See Caldwell v. Seaboard Coastline R.R., 15 FEP Cases 428 (W.D.N.C. 1977).

Evans dealt with a female flight attendant who charged that the operation of her employer's seniority system violated Title VII. Evans was employed by United Airlines from November, 1966 to February, 1968, when she was allegedly forced to resign pursuant to United's policy which required female flight attendants to remain single. She was rehired on February 16, 1972, and filed charges with the EEOC in February, 1973. It was undisputed that United's policy of requiring married female flight attendants to resign was discontinued in November, 1968. It was also undisputed that, as there was no continuing wrong against either the plaintiff or against the class of women flight attendants, because of plaintiff's failure to file a charge within 90^{37/} days of her separation

^{37/} Ninety days was the original period within which one was required to file a complaint pursuant to Title VII.

from United, her claim based upon that allegedly discriminatory act was barred. Evans at 4567.

In the above circumstances, the Supreme Court held that the plaintiff's charge was time-barred, as she had failed to allege a current violation of Title VII. After United had discontinued its policy barring married female flight attendants, and after Carolyn Evans failed to file charges of discrimination within 90 days of her discharge, the Court held that United was entitled to treat that discharge as lawful. The complaint in Evans did not allege that United's seniority system treated female and males differently, or that United's seniority system was anything other than bona fide.

In Cates TWA black flight crew personnel complained of the loss of seniority by reason of earlier racial discrimination which, it was stipulated, had terminated at a time pre-dating the Title VII time-bar. By stipulation "all claims of current discrimination" were omitted. Cates at 332. The Cates plaintiffs made no charges "that the seniority system is not bona fide or even operated in other than a neutral fashion." Id. at 336. Evans, was, of course, held to govern, and the complaint dismissed. Significantly, this Court cited and discussed Acha in Cates, and, unlike the court below, did not treat Acha as if it had been vitiated by Evans; instead this Court said that "Acha did not present the type of limitations problems with which we are confronted here." Cates at 334.

Unlike Evans and Cates, the discriminatory practices here complained of did not cease. The long history of discrimination by the PD against women continued up through the June 30, 1975 lay-

offs. The present case, unlike Evans and Cates, deals with a continuing discriminatory policy against the class of Policewomen and applicants for that position. Also unlike Evans and Cates, the bona fides of the seniority system used by the PD, based upon a merged list of Patrolmen and Policewomen, is here effectively challenged. The June 30, 1975 lay-offs were themselves discriminatory in that they had a disproportionate impact on women in the PD, and were not justified by a facially neutral seniority system, as the decision to lay-off men and women in the PD based on a merged list of separate titles was an act of discretion, not mandated by Civil Service Law §80.

Evans and Cates did not reverse the long line of cases under Title VII which held that where there is a continuing pattern of discrimination, the required time period for filing a charge with the EEOC is held to run from the last occurrence of the discrimination. See, e.g., Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969); Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. 1973); Kohn v. Royall, Koegal & Wells, 49 F.R.D. 515 (S.D.N.Y. 1973), app. dis. 496 F.2d 1094 (2d Cir. 1974); Bartness v. Drewrys U.S.A. Inc., 444 F.2d 1186 (7th Cir. 1971), cert. den., 404 U.S. 939 (1971). This principle was not ignored by the Supreme Court in Evans, which stated that for purposes of Title VII liability there need be a "present violation" of the Act [i.e., a violation within the 180 or 300 day §706(e) periods]. Evans at 4567; see also Cates at 336 n. 10.

That the running of §706(e), is to be measured from the last occurrence of continued discriminatory practices is clear from

the legislative history of the 1972 amendments to §706(e) which extended the coverage of that Act to employees of State and local governments:

"This subsection as amended provides that charges be filed within 180 days of the alleged unlawful employment practice. Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumvented by the extension of the time limitations in this subsection. Existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued and other interpretations of the courts maximizing the coverage of the law are not affected. It is intended by expanding the time period for filing charges in this subsection that aggrieved individuals, who frequently are untrained laymen, and who are not always aware of the discrimination which it practices against them, should be given a greater opportunity to prepare and file their complaints and that existent but undiscovered acts of discrimination should not escape the effect of the law through a procedural oversight. Moreover, wide latitude should be given individuals in such cases to avoid any prejudice to their rights as a result of government inadvertence, delay or error." [Section-by-Section Analysis of H.R. 1746, 92d Cong., 2nd Sess., at 118 Cong. Rec. 7167 (Senate, March 6, 1972); 118 Cong. Rec. 7565 (House, March 8, 1972)]

The vitality of the continuing wrong theory is dramatically demonstrated by §706(g) of Title VII, 42 U.S.C. §2000e-5(g). That section permits back pay liability to accrue for a period of two years prior to the filing of a complaint with the EEOC, a period greater than the 180 and 300 day limitations period provided for by §706(e). The clear and only possible implication of the two year back pay bar of §706(g) is that a wrong initiating before, but continuing into the 180 or 300 day limitation period must be cognizable and remediable under Title VII.

The continued pattern of discrimination in the hiring to positions in the PD between January, 1973 and September, 1974 and the discriminatory decision to use a merged list for lay-off purposes in June, 1975, resulting in the disproportionate lay-off of women from the PD, supply the present and continuing violation absent in Evans and Cates. The last act of discrimination, prior to the filing of charges by plaintiffs, was the decision to lay-off the majority of all Policewomen. Throughout the course of this litigation, it has been plaintiffs' position that what is principally complained of here are the lay-offs. The charges herein were filed prior to the lay-offs, and therefore timely.

Even if the last act of defendants' continuing discrimination was the failure to grant the 72 class members their rightful seniority at their date of hire, there was a violation of Title VII within the required 300 days. The effective filing date with the EEOC on behalf of the class was September 11, 1973, when Alice McCain filed her EEOC complaint.^{38/} A. 577; AD. 124. The matters charged

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^{38/} Although this filing was not raised in this action until July 14, 1977 (A. 577-78), it was timely raised and litigated since the EEOC McCain right to sue letter was received on August 12, 1977 (AD. 125) and the amended complaint with the McCain allegations was served on August 29, 1977 (AD. 112). There is no indication by defendants that the EEOC ever dismissed the McCain charge or that no conciliation was effected or that she was notified of a failure of conciliation. See AD. 75-77. In such circumstances the time to sue is 90 days from August 12, 1977. 42 U.S.C. §2000e-5(f)(1) [Title VII §706(f)(i)]; Turner v. Texas Instruments, 15 FEP Cases 481 (5th Cir. 1977). The intervening period from September 11, 1973 to August 29, 1977 does not constitute laches [Turner v. Texas Instrument, *supra*, (5 years); Garner v. E.I. Dupont DeNemours & Co., 538 F.2d 611 (4th Cir. 1976) (four years); Tuft v. McDonnell Douglas Corp., 517 F.2d 1301 (8th Cir. 1975) (3 years); Lacy v. Chrysler Corp., 533 F.2d 353 (8th Cir. 1976) (2 years); Williams v. Southern Union Gas Company, 529 F.2d 483 (10th Cir. 1976) (3 years)], particularly in view of the pendency of Acha since June, 1975, which presumably protected McCain's interest. Requiring McCain to sue before EEOC completion of its processing of the complaint, evidenced by a right to sue letter or other notice to

(Continued)

on September 11, 1973 by McCain allege, inter alia, PD sex discrimination in hiring. AD. 83-84, 128-129. Under §706(e) McCain can cover events 300 days prior to September 11, 1973, which brings January 29, 1973 into this action, the earliest hiring date of members of the class. See AD. 91-92.

The time period implicated by the McCain EEOC complaint is applicable to all others in the class. Franks v. Bowman Transportation Co., 424 U.S. 747, 752-57, 770-79 (1976); Albermarle Paper Co. v. Moody, 422 U.S. 407, 414 n. 8, 423-25 (1975); Romasanta v. United Air Lines, Inc., 537 F.2d 915, 918 n. 6 (7th Cir. 1976), aff'd., 45 U.S.L.W. 4760 (U.S. Sup. Ct. 1977); Laffey v. Northwest Airlines, 13 FEP Cases 1068, 1069 (D.C. Cir. 1976); Wetzel v. Liberty Mutual Insur. Co., 508 F.2d 239, 246 (3rd Cir. 1975), cert. den., 421 U.S. 1011 (1975); U.S. v. Georgia Power Co., 474 F.2d 906, 925 (5th Cir. 1973); Allen v. Amalgamated Transit Union, 554 F.2d 876, 882-83 (8th Cir. 1977). And the permissible scope of the litigation following the complaint filed by any class member with the EEOC is as broad as any aspect of that complaint and the EEOC investigation reasonably likely to grow out of the complaint. Macklin v. Spector Motor Freight, 478 F.2d 979, 988 (D.C. Cir. 1973); Ostapowicz v. Johnson Brass Co., 541 F.2d 394, 398-99 (3rd Cir. 1976); Gamble v. Birmingham Southern R.R. Co., 514 F.2d 678, 687-89 (5th Cir. 1975); Sanchez v. Standard Brands, 431 F.2d 455, 466 (5th Cir. 1970); McBride v. Delta Airlines, 551 F.2d 113, 115 (6th Cir. 1977); Jenkins v.

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Continued

such effect, would be inconsistent with the Title VII policy, manifested in Occidental Life Insurance Co. v. EEOC, 45 U.S.L.W. 4752 (U.S. Sup. Ct. 1977), that such EEOC processing and subsequent litigation are not to be subject to time-bar constraints.

Blue Cross Mutual Ins. Co., 538 F.2d 164 (7th Cir. 1976) (en banc); cf. EEOC v. Hearst Corp., 553 F.2d 559 (9th Cir. 1976). The McCain EEOC complaint thus renders timely (and not time-barred) not only the independent Title VII violation of the June 30, 1975 lay-offs but the further independent Title VII violation consisting of the 1973-74 PD hiring discrimination that was reflected in the lay-offs.

In Cates this Court left open and undecided whether §706(e) runs from the date of a discriminatory refusal to hire or from the date of hiring with lesser seniority attributable to such refusal. Cates at 336 n. 10. Here that issue must be resolved in favor of the latter date. The refusal to hire women started prior to March 1972,--each of the 72 class members having been barred because of their sex from taking exams in 1969 or earlier,--and could not have then been the subject of an EEOC complaint. Moreover, the discrimination was, primarily, not in the form of an express refusal, but in the form of a deterrent by confining eligibility to men so that the event of refusal which might otherwise start §706(e) was absent here. And since it was not known or even determined prior to 1975 that for lay-off purposes seniority would be on the basis of merged rather than separate titles, the filing of lay-off complaints with the EEOC even as late as June 1975 cannot be deemed barred by §706(e). For not until June 1975 could a Policewoman have known that her competitive seniority for lay-off purposes was measured by the merged seniority of the separate titles of Patrolman and Policewoman rather than just the seniority of Policewomen. In such circumstances §706(e) cannot fairly run from a time ante-dating the appointment of a class member and most properly

should run from the date of the lay-offs.

D.

It was error to deny permanent injunctive relief even if Teamsters and Evans are applied in the manner utilized by the court below.

Permanent injunctive relief is appropriate under Title VII even on the premises employed by the court below. According to Judge Duffy, the PD hiring of a male before the hiring of a female with a higher test score was a violation of Title VII. While the decision below does not specify the relief to be granted such a discriminatee, presumably, in the light of the injunctive relief previously granted by the court below (see pp. 8-9 supra), such a FPW discriminatee would be accorded, as a revised seniority date, the post-March 24, 1972 date of appointment of the male with a lower score, for purposes of future rehiring (see A. 318, 474) and salary level, examination eligibility, vacation pick, etc., upon rehiring (see A. 317, 474-75).

The test scores and appointment dates of the 72 class members appear in the record, transcripts of the hearings before the Special Master, and other records produced by defendants. A. 195-96, 282, 293-300. The test scores of the 72 class members range from 76 (Jane Waye) to 98 (Carol Grace); the test scores of the 11 class members range from 76 (Jane Waye) to 96 (Kathleen Jappe and Theodora Moscatelli). The appointment dates of the 11 class members range from February 26, 1973 (Moscatelli) to November 19, 1973 (Waye); and for the entire 72 class members from January 29, 1973 (Catherine

Braun and Alicia Parker) to November 19, 1973 (Waye).^{39/}

The names and test scores of males appointed on January 29, 1973 have also been produced by defendants. Three scored 75 (Henry Harrison, Jr.,; Frank R. Saisa; Robert A. Sorrentino), and seven scored 76. Thus on January 29, 1973 ten males were appointed with marks lower than or equal to the lowest mark scored by any of the 72 class members, and only two of those 72 were appointed on that date. By the standard used by the court below, all of the 72 class members were entitled to a January 29, 1973 seniority date which would have entailed a revised seniority date of all the 11 class members and at least 70 of the 72 class members.

The seniority revision indicated by the standard used by the court below mandates meaningful permanent injunctive relief even if the January 29, 1973 date does not avoid the April 1, 1971 lay-off cut-off date. For relief here has so far been limited to the right to recognition of a revised seniority date for rehiring and for salary - level, tenure, and working condition (vacation pick, assignments, etc.) purposes upon rehiring. Revised seniority has not been used to bump any incumbent. A. 587. Accordingly, any revised seniority date, not just pre-April 1, 1971, is significant. And as we have been advised by defendants' counsel that there have been permanent PD rehiring of April 30, 1973 appointees (see A. 535), the denial of permanent injunctive relief, which provides for and implements rightful seniority dates for rehiring and related purposes, was clear error even by the standards used by the court below.

^{39/} Two FPW were appointed in 1974 for reasons not here relevant (Monica L. Sullivan and Margaret O'Shaughnessy). See A. 550.

III.

IT WAS ERROR FOR THE COURT BELOW TO
VACATE AND DENY §1983 AND FOURTEENTH
AMENDMENT INJUNCTIVE RELIEF TO CLASS
MEMBERS WHO ESTABLISHED THAT THEY
WERE VICTIMS OF PD SEX DISCRIMINATION.

The court below recognized that §1983 will afford relief as to the disparate lay-offs of June 30, 1975 and as to the sex segregated hiring from and after June 30, 1972 if intentional discrimination is shown. In this aspect of the case, unavailability of Title VII relief is not determinative of §1983 rights in that the Fourteenth Amendment and §1983 provide a remedy for victims of discrimination independent of that provided for by Title VII. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Johnson v. Railway Express Agency, 421 U.S. 454 (1975). In the circumstances, no reason appears to have denied §1983 relief to the 72 class members who have proven, after hearings, that they were discriminatees.

A.

The record here clearly establishes
violations of §1983.

Each of the 72 class members demonstrated before the Special Master and the court below that she had been denied earlier appointment to the PD because she was a victim of sex discrimination. That such discrimination was intentional within the meaning of Washington v. Davis, 426 U.S. 229 (1976) ("Davis"), cannot be seriously disputed. In each case the discrimination was the result of disparate treatment by sex.^{40/} The initial dis-
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^{40/}The difference between disparate treatment and disparate impact in discrimination cases is set out in Teamsters at 4509 n. 15.

crimination consisted of barring women from the great majority of tests which were held exclusively for men. No reason for such prejudicial proscription by sex exists.

Defendant Codd, the New York City Police Commissioner, stated that there is no proof that one sex is better suited than the other for the performance of police work.^{41/} A.270-71. He characterized programs in which Policewomen performed the same range of duties as Patrolmen as "extremely successful." AD.67. The Vera Institute of Justice study, Women on Patrol: A Pilot Study of Police Performance in New York City (1977), prepared at the instance of the Police Commissioner (A. 271), constitutes the most comprehensive study of police patrol performance by women in New York City and concluded:

"The results add to a growing body of evidence justifying assignment of women to patrol, but they reveal consistent--though small--differences between the performance of the women and the men in some areas....

Some of these disparities disappeared when the women were assigned to patrol with female partners or were assigned to a precinct in which supervisors were particularly receptive to their presence. This finding suggests that some of the performance differences were socially engendered.

The differences in patrol performance appear
55.

^{41/}Studies of women on police patrol in Washington, D.C., St. Louis, and New York City have shown no important differences between patrol performance by male and female patrol officers. Peter B. Bloch, and Deborah Anderson, Policewomen on Patrol: Final Report (Washington, D.C.: Police Foundation, 1974); Lewis Sherman, "An Evaluation of Policewomen on Patrol in a Suburban Police Department," Journal of Police Science and Administration, 1975, Volume 3, Number 4, pp. 434-438; and Judith E. Greenwald and Harriet A. Connolly, Policewomen on Patrol: New York City (unpublished manuscript, 1974).

rooted to some extent in the differential deployment of male and female officers. The women were often assigned, during the seven-month period of observations, to traditionally female duties such as standing guard over female prisoners at police facilities, a job viewed by some of them, particularly the younger officers, as 'dead-end' and which gave them significantly less patrol experience. Not only were the women less often assigned to patrol duty but, when on patrol, they were less often assigned to ride with the same patrol partner; they therefore had less opportunity to gain knowledge of their precincts and of the ground rules for participating with a partner in patrol functions.

Finally, the women's morale had recently suffered --perhaps more than the male officers' morale-- because female officers were particularly hard hit by lay-offs in 1975 resulting from the City's fiscal crisis." (Id. at xiv-xv.)

Section 1983 violations are no less clearly established by the record under the standard of §1983 liability adopted by the court below. If, as that court held, an act of discrimination occurs when a male is appointed before a female with a higher score, then the record demonstrates and it cannot be controverted that such acts occurred as to virtually all 72 class members. See pp. 52-53 supra. The court below held that such acts constituted the §1983 violations for timeliness purposes. A. 596. But even if further proof of intention were required in such cases, it would be supplied by the circumstance that such appointments were based upon sex segregated tests and lists from which no justification can be found. Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971); Craig v. Boren, 45 U.S.L.W. 4057 (U.S. Sup.Ct. 1977).

That the lay-offs here violated §1983 is clearly established by this Court's decision in Chance IV, as to which the

Supreme Court denied certiorari on June 14, 1977 (45 U.S.L.W. 3806). In Chance IV this Court dealt with the rightful seniority rights, under §1983, in the excessing or lay-off of school supervisory personnel who had either failed to pass or failed to take promotional examinations found to be racially discriminatory. The District Court substituted a racial quota for the statutory and contractual last-hired first-fired seniority system. This Court reversed and held:

"If a minority worker has been kept from his rightful place on the seniority list by his inability to pass a discriminatory examination, he may, in some instances, be entitled to preferential treatment--not because he is Black, but because, and only to the extent that, he has been discriminated against. The 'freedom now' and 'rightful place' doctrines create constructive or fictional seniority to put minority employees in the approximate spot on the seniority list that they would have occupied had they not been the subject of discrimination. Local 189, United Papermakers v. United States, supra, 416 F.2d at 988. The former contemplates the displacement of white workers where necessary; the latter involves only the filling of vacancies. We have followed the 'rightful place' doctrine....

The defendant Board of Education has indicated its willingness to accord constructive seniority to any minority supervisor who failed an examination since invalidated as discriminatory by giving him a date of appointment which is the mean appointment date of those who passed the examination. We believe this offer of compromise which appears to be acceptable to the intervening Union should have been adopted by the District Court." (534 F.2d at 999)^{42/}

On rehearing this Court further held that Franks and

Acha:

"support the relief of constructive seniority afforded by this court to the plaintiffs who took and failed discriminatory supervisory

57.

^{42/} This language was quoted by this Court, with emphasis, in Acha. 531 F. 2d at 653-54.

examinations. They also bear on the relief to be afforded to...those who 'have failed to apply for or take such supervisory examinations because they reasonably believed the supervisory examination to be discriminatory and unrelated to job performance.' Chance v. Board of Examiners, 70 Civ. 414 (S.D.N.Y. May 21, 1973) (order of Mansfield, J.), at 7. Accordingly we modify so much of our prior decree as relates to the Mercado class and order that the case be remanded to the district court with directions to accord constructive seniority to the members thereof who have heretofore established or can establish by the usual preponderance of the evidence that they qualify as such." 534 F.2d at 1007.)

Chance IV thus establishes that a §1983 violation exists where one is deterred from taking a discriminatory test and the discriminatee subsequently is denied, by reason of such deterrence, his/her rightful seniority on the occasion of a lay-off. This identical principle was adopted in Acha, in explicit reliance upon Chance IV (531 F.2d at 653-54), and was not disturbed by the Supreme Court even after Davis, Teamsters and Evans.

Chance IV, as well as Acha, assumed a neutral bona fide seniority system which was not subject to invalidation for perpetuating past discrimination. 534 F. 2d at 997-99. The §1983 violation found by this Court in Chance IV, as the Title VII violation in Acha, was not the seniority system but the lay-off in the absence of rightful seniority, i.e., the denial to the discriminatee of his "rightful place on the seniority list" to be remediated, "only to the extent that, he has been discriminated against," by giving him such a place. 534 F. 2d at 999. Chance IV thus squarely sustains the lay-offs here as §1983 violations and the integrity of that proposition after Davis, Teamsters and Evans.

The force of Chance IV is here particularly great since the bona fides of the seniority system assumed is lacking here where a sex discriminating application of the seniority system was elected and installed on the eve of the lay-offs notwithstanding the availability of other non-discriminatory money-saving options.

B.

The Teamsters' seniority bar does not apply to the plaintiffs' Fourteenth Amendment and/or §1983 rights or remedies.

Teamsters held that §703(h) immunized perpetuation of pre-Title VII discrimination by a bona fide seniority system; it was acknowledged that post-Title VII discrimination was remediable and would be remediated by rightful seniority notwithstanding §703(h). Teamsters at 4511-13; see also Franks at 757-762. Since Teamsters is confined to the immunization of seniority freezing pre-Act discrimination, it is inapplicable to a seniority system which perpetuates §1983 discrimination. Post-Act discrimination for §1983 purposes would cover a period in excess of 100 years. The discriminatory hiring here reflected in the lay-offs by way of seniority violates §1983 and is not exculpated by the Teamsters doctrine.

Moreover, it was specified in Teamsters that, absent §703(h), the application of a non-discriminatory seniority system would violate Title VII if it perpetuated discrimination. Teamsters at 4512. Neither §1983 nor the Fourteenth Amendment contains any provision analogous to §703(h). There is, therefore, in those provisions no §703(h) immunization of discrimination frozen into a seniority system. And since it is settled that the Constitution

and §1983 provide rights and remedies distinct from those created by Title VII (see p. 54 , supra), the §703(h) limitation may not be incorporated into those earlier rights and remedies. It would be an extraordinary perversion of Title VII, expressly enacted to expand pre-existing rights of public employees to be protected from discrimination (see pp. 41-42 supra), to read §703(h) as a diminution of or bar to rights which existed for a century before the enactment of §703(h).

In Chance IV this Court held that a bona fide seniority system would be sustained under §1983 if immunized by §703(h). 534 F.2d at 998. But the Court there, as in Acha, held that the perpetuation of past discrimination by such a seniority system is a §1983 violation to be remediated by rightful seniority which accepts and implements, and does not invalidate the immunized seniority system. The denial of certiorari in Chance IV indicates the described compatibility between Chance IV and Teamsters.

C.

The Evans time-bar does not apply to Fourteenth Amendment and/or §1983 rights or remedies.

In Kaiser v. Cohn, 510 F.2d 282, 284-285 (2d Cir. 1974), this Court held that in actions pursuant to §1983 (which does not have its own statute of limitations), the most analogous New York statute, CPLR §214(2), governs. CPLR §214(2) prescribes a three-year statute of limitations period for an action to recover upon a "liability, penalty or forfeiture created or imposed by statute."

If the §1983 violation is the June 30, 1975 lay-offs without according discriminatees their rightful seniority, as this Court held in Chance IV and in Acha, then nothing in Evans or CPLR §214(2) bars this action. Moreover, it is undisputed that the discriminatory quota limiting the number of women in the PD was maintained until at least 1973, within three years of the date this action was commenced. Appointments to the position of Patrolman were made between 1970 and 1973 from males who had previously been appointed as Trainees and no women were appointed as Police-women during this period. And when the PD did begin hiring women in 1973, it did so from separate, sex segregated lists. The uncontradicted facts therefore demonstrate that defendants' discriminatory practices continued through at least 1973, less than three years before the date this action was commenced.

D.

The Fourteenth Amendment and §1983 remedies here available are the substantial equivalent of those in the injunctive relief vacated and denied by the court below.

1. The remedial obligations of the various defendants under §1983 and the Fourteenth Amendment.

The complaint names the City of New York as a defendant, and Mayor Beame and Police Commissioner Codd, in their official and in their individual capacities, as defendants. Each has a defined form of liability under §1983 and the Constitution.

It is well-established that §1983 does not give rise to money damages qua damages alone against a municipality or a public

official in his official capacity. Monroe v. Pape, 365 U.S.167 (1961); Monnell v. Dept. of Social Services; etc., 532 F.2d 259, 262-264 (2d Cir. 1976).^{43/} It is equally well-settled that money damages qua damages alone may be recovered against an official in his individual capacity for his individual acts. Scheuer v. Rhodes, 416 U.S. 232 (1974); Rizzo v. Goode, 423 U.S. 362 (1976). And, as this Court pointed out in Monnell, supra, at 264:

"There is no doubt that municipal and state officials, sued in their official capacities, are 'persons' within the meaning of §1983 when they are sued for injunctive or declaratory relief. See Wright v. Chief of Transit Police, 527 F.2d 1262, 1263 (2d Cir. 1975); Greshman v. Chambers, 501 F.2d 687, 690 (2d Cir. 1974); Erdman v. Stevens, 458 F.2d 1205, 1207-08 (2d Cir.), cert. den., 409 U.S. 889, 93 S.Ct.126, 34 L.Ed.2d 147 (1972)."

Where, as here, back pay or pension adjustment is sought as an "adjunct of equitable relief" of reinstatement (Monnell, supra, at 267), or of declaratory relief as to seniority date, it is available against officials sued in their official capacity because it is viewed as an incident of such relief. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937); Smith v. Hampton Training School, 360 F.2d 577, 581 (4th Cir.1966); Burt v. Board of Trustees, etc., 521 F.2d 1201, 2105 (4th Cir. 1975); Harkless v. Sweeny Independent School District, 427 F.2d 319, 323 (5th Cir. 1970), cert. den. 460 U.S. 991 (1971); McFerren v. County Bd. of Ed.,

^{43/} There is authority for the proposition that a municipality is liable for money damages qua damages alone under 28 U.S.C. §1331 or §1332 for constitutional violations. Popkin v. New York State, etc., 547 F.2d 18n.5 (2d Cir. 1976), cert. den. 45 U.S.L.W. 3822 (1977), and cases there cited; see also Note 89 Harv. L.Rev. 922 (1976). The second amended complaint specifically asserts 28 U.S.C. §1331 as a jurisdictional basis for remediating constitutional violations. AD 113.

455 F.2d 199 (6th Cir. 1972); Rogers v. Loether, 467 F.2d 1110, 1121 n.35 (7th Cir.1972) (Stevens, J.), aff'd., 415 U.S. 189 (1974); Turano v. Bd. of Ed., etc., 411 F.Supp. 205,212 (E.D.N.Y. 1976); Flores v. Local 25, etc., 407 F. Supp. 218,220 (E.D.N.Y. 1976).

2. The judicial relief authorized pursuant to §1983 and the Constitution includes the same powers to fix seniority dates, reinstate, and make-whole as the court below first decreed and then vacated or denied.

As indicated, the City and each of the individual defendants, in his official as well as his individual capacity, is subject to comply with appropriate equitable relief here and the "adjunct" monetary relief. The appropriate equitable relief,--which existed before and exists apart from Title VII,--includes the whole gamut of make-whole remedies, including adjusted seniority dates, reinstatement, back pay and other monetary adjuncts available under Title VII. For those Title VII remedies are not a function of the terms of Title VII, but rather a function of the judicial equity powers in a Title VII action,--the same equity powers expressly provided by §1983 and inherent in remediating constitutional violations.

In the first and leading Supreme Court case dealing with Title VII remedies, Albermarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975), the Court said:

"It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to 'secur[e]

complete justice,' Brown v. Swann, 10 Pet. 497, 503 (1936); see also Porter v. Warner Holding Co., 328 U.S. 395, 397-398 (1946). '[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.' Bell v. Hood, 327 U.S. 678, 684 (1946). Title VII deals with legal injuries of an economic character occasioned by racial or other antiminority discrimination. The terms 'complete justice' and 'necessary relief' have acquired a clear meaning in such circumstances. Where racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' Louisiana v. United States, 380 U.S. 145, 154 (1965). And where a legal injury is of an economic character, '[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.' Wicker v. Hoppock, 6 Wall. 94 99 (1867)."

Later, in Franks, the language in Albemarle just quoted was again referred to (424 U.S. at 763), and the Court emphasized that in 1972 Title VII was amended specifically to invest courts in Title VII actions with "equitable power" [§06(g)] so that such courts could "fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of...discrimination in hiring." 424 U.S. at 764; see also id. at 763-66. The relief thus authorized by the judicial equity power was held by Franks to include seniority date adjustment, a remedy not expressly provided by Title VII. Id. at 763-70.

Chance IV, of course, is the definitive demonstration of

the availability under §1983 of the Title VII injunctive relief first granted and then vacated or denied by the court below. The Acha mandate to ascertain the rightful seniority date of a discriminatee and to give appropriate effect to such date was derived from Chance IV. According to Acha:

"Chance IV indicates that retroactive 'constructive' seniority, even prior to the date of appointment, might be appropriate relief for any identifiable minority group supervisor who had taken a discriminatory examination and failed. It is for this reason that the majority stated that a compromise embodying precisely that concept 'should have been adopted by the district court.'

Such constructive seniority back to the date when they would have been hired had there been no discrimination is the relief sought by the laid-off women here, at least in their amended complaint. We believe that Bethlehem Steel and Chance IV both indicate that plaintiffs are entitled to that relief if they can prove their case under conditions discussed below." (531 F.2d at 654.)

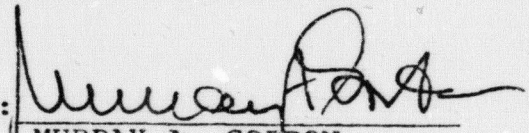
The relief here previously decreed, pursuant to the Acha mandate, is therefore equally available under §1983 in view of the derivation of the Acha Title VII relief from the Chance IV §1983 remedy.

Conclusion

The order appealed from should be reversed and the permanent injunctive relief vacated and denied should be reinstated and granted, respectively.

Respectfully submitted,

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CORPORATION COUNSEL